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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 423

LEVERING & GARRIGUES COMPANY, HEDDEN IRON CONSTRUCTION COMPANY, McCLINTIC-MARSHALL COMPANY, ET AL., PETITIONERS,

vs.

PAUL J. MORRIN, INDIVIDUALLY AND AS PRESIDENT OF INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCT. [illegible], 1932

CERTIORARI GRANTED NOVEMBER 7, 1932

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IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Equity. 31259

LEVERING & GARRIGUES COMPANY, HEDDEN IRON CONSTRUCTION COMPANY, Hay Foundry & Iron Works, and McClintic-Marshall Company, Plaintiffs,

vs.

PAUL J. MORRIN, Individually and as President of International Association of Bridge, Structural & Ornamental Iron Workers; William J. Wade, Individually and as President of Local #40, International Association of Bridge, Structural & Ornamental Iron Workers; Charles McDonald, Individually and as President of Local #361, International Association of Bridge, Structural & Ornamental Iron Workers; Edward Coleman, Individually and as President of Local #52, International Association of Bridge, Structural & Ornamental Iron Workers; Arthur Bolton, Individually and as President of Local #197, International Association of Bridge, Structural & Ornamental Iron Workers; David Baxter, Individually and as President of Local #170, International Association of Bridge, Structural & Ornamental Iron Workers (District Council of New York and Vicinity, International Association of Bridge, Structural & Ornamental Iron Workers); Local #40, International Association of Bridge, Structural & Ornamental Iron Workers; Local #52, International Association of Bridge, Structural & Ornamental Iron Workers; Local #197, International Association of Bridge, Structural & Ornamental Iron Workers; Local #361, International Association of Bridge, Structural & Ornamental Iron Workers; Local #170, International Association of Bridge, Structural & Ornamental Iron Workers; John Snyder, Henry C. Wolf, Owen J. O'Brien, William P. McGinn, Patrick Farrell, Charles Massay, and Earl Calvert, Defendants

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The plaintiffs above-named in the caption hereof bring this, their bill of complaint, against the defendants above [fol. 2] named in the caption hereof, and for their cause of action respectfully show to your Honors:

1. Plaintiff, Levering & Garrigues Company is a corporation of the State of New Jersey, with its principal office in Dunnellen, New Jersey. It is a resident, citizen and inhabitant of the State of New Jersey and is not a resident, citizen or inhabitant of the State of New York; it is engaged in the fabricating and erection of structural iron and steel; it has invested in its business upwards of $1,000,000.00; a large part of that investment is in the State of New York; it has since 1906 employed open shop methods as herein defined with respect to its relations to labor, both in its fabricating and erecting end; prior to the first day of February, 1925, and at the present time it had and has contracts for the construction of work in the State of New York, City of New York, involving an amount in excess of $2,000,000.00.

2. Plaintiff, McClintic-Marshall Company is a corporation of the State of Pennsylvania. It is a resident, citizen and inhabitant of the State of Pennnsylvania and is not a resident, citizen or inhabitant of the State of New York; it is engaged in the fabricating and erecting of structural iron and steel; it has invested in its business upwards of $2,000,000; a large part of which is in the State of New York; it has since 1906 employed open shop methods as herein defined with respect to its relations to labor, both in its fabricating and erecting end; prior to the first day of February, 1925, and at the present time it had and has contracts for the construction of work in the State of New York, City of New York, largely in excess of $3,000,000.

[fol. 3] 3. Plaintiff, Hedden Iron Construction Company, is a corporation organized under the laws of the State of New Jersey; it is a resident, citizen and inhabitant of the State of New Jersey, and is not a resident, citizen or inhabitant of the State of New York; it is engaged in the

business of fabricating and erecting structural iron and steel; it has invested in its business upwards of $200,000.00, a large part of which investment is in New York City; for upwards of ten years last past it has operated in its relation with labor upon the open shop methods, both in its fabricating and erecting department and it has on the first day of February, 1925, contracts for the construction of work in the State of New York, City of New York, involving an amount in excess of $500,000.

4. Plaintiff, Hay Foundry & Iron Works is a corporation organized under the laws of the State of New Jersey, and is a resident, citizen and inhabitant of the State of New Jersey and is not a resident, citizen or inhabitant of the State of New York; it is engaged in the business of fabricating and erecting structural iron and steel and has an investment of upwards of $2,000,000.00, of which upwards of $75,000 is invested in the State of New York. Since 1906 it has operated upon what is known as the open shop method in its relation to labor, both in its fabricating and erecting departments. On the first of February, 1925, it had and has contracts for the construction of work in the City of New York, State of New York, involving an amount in excess of $2,500,000.

5. Defendant, Paul J. Morrin, is a resident, citizen and inhabitant of the State of Missouri; defendant, International Association of Bridge, Structural and Ornamental [fol. 4] Iron Workers is a voluntary labor organization, and is a resident, citizen and inhabitant of the State of Missouri and is not a resident, citizen or inhabitant of the State of New York; defendant, District Council of New York and Vicinity of International Association of Bridge, Structural and Ornamental Iron Workers is a subsidiary organization of the International Association of Bridge, Structural and Ornamental Iron Workers and is a resident, citizen and inhabitant of the State of New York; defendant, Edward Coleman, individually and as president of Local #52, International Association of Bridge, Structural and Ornamental Iron Workers is a resident, citizen and inhabitant of the State of New York; defendant Local #52, International Association of Bridge, Structural and Ornamenal Iron Workers is a subsidiary local of the International Associa-

tion of Bridge, Structural and Ornamental Iron Workers and is a resident, citizen and inhabiant of the State of New York; defendant, Arthur Bolton, individually and as president of Local #197, International Association of Bridge, Structural and Ornamental Iron Workers, is a resident, citizen and inhabitant of the State of New York; defendant, Local #197, International Association of Bridge, Structural and Ornamental Iron Workers, is a subsidiary local of the International Association of Bridge, Structural and Ornamental Iron Workers, and is a resident, citizen and inhabitant of the State of New York; William J. Wade, individually and as President of Local #40, International Association of Bridge, Structural and Ornamental Iron Workers, is a resident, citizen and inhabitant of the State of New York; defendant, Local #40, International Association of Bridge, Structural and Ornamental Iron Workers; is a subsidiary local of the International Association of [fol. 5] Bridge, Structural and Ornamental Iron Workers, and is a resident, citizen and inhabitant of the State of New York; defendant, Charles McDonald, individually and as president of Local #361, International Association of Bridge, Structural and Ornamental Iron Workers, is a resident, citizen and inhabitant of the State of New York; defendant Local #361, International Association of Bridge, Structural and Ornamental Iron Workers, is a subsidiary local of the International Association of Bridge, Structural and Ornamental Iron Workers and is a resident, citizen and inhabitant of the State of New York; defendant, John Snyder, is a business agent of Local #52, International Association of Bridge, Structural and Ornamental Iron Workers, and is a resident, citizen and inhabitant of the State of New York; defendant, Henry C. Wolf is the business agent of Local #52, International Association of Bridge, Structural and Ornamental Iron Workers, and is a resident, citizen and inhabitant of the State of New York; defendant, Owen J. O'Brien, is the business agent of Local #197, International Association of Bridge, Structural and Ornamental Iron Workers, and is a resident, citizen and inhabitant of the State of New York; defendant-, William C. McGinn and Patrick Farrell are organizers of the International Association of Bridge, Structural and Ornamental Iron Workers, and are residents, citizens and inhabitants of the State of New York; defendant, David Baxter, Busi-

ness agent of Local #170, International Association of Bridge, Structural and Ornamental Iron Workers, is a citizen, resident and inhabitant of the State of New York; defendant Local #170, is a subsidiary local of the International Association of Bridge, Structural and Ornamental [fol. 6] Iron Workers, and is a resident, citizen and inhabitant of the State of New York; defendant, Charles Massey, is business agent of Local #40, International Association of Bridge, Structural and Ornamental Iron Workers, and is a citizen, resident and inhabitant of the State of New York; defendant, Earl Calvert, Business Agent of Local #361, International Association of Bridge, Structural and Ornamental Iron Workers and is a citizen, resident and inhabitant of the State of New York.

6. This suit is of a civil nature in equity and the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00.

7. The International Association of Bridge, Structural and Ornamental Iron Workers is a voluntary labor organization affiliated with the American Federation of Labor; and it claims, and has claimed, since its organization prior to 1906, authority over all persons engaged in the erection of structural iron and steel, and since, in or about the year 1918, it has claimed authority over all persons engaged in the fabricating of structural iron and steel; and has and does claim jurisdiction of all persons engaged in the fabrication and erecting of ornamental iron and steel and over all persons engaged as riggers and also in the removal of machinery and over all stone derrickmen; it has consistently taken the position that no person can be employed anywhere in the United States or in Canada in said employments, unless he be a member of said organization; it is made up of different locals, the locals having jurisdiction of those engaged in the erecting of structural iron and steel within the territory of New York City is Local No. 40, with its headquarters at 62 East 106th Street, Borough of [fol. 7] Manhattan, the Business Agents of which are Charles Massey and Charles A. Howard; Local No. 361, with its headquarters at 35 Fifth Avenue, Borough of Brooklyn, the Business Agent of which is Earl Calvert. The Local having jurisdiction in the territory of New York

City over those engaged in the erection of ornamental iron and steel is Local #52; the local having jurisdiction over stone derrickmen in the City of New York is Local No. 197, of which local, Owen J. O'Brien, is business Agent. The various local unions are also represented in district councils and the district council claiming jurisdiction over New York City and vicinity is known as District Council of New York and Vicinity, which District Council Locals Nos. 40 and 36, 52 and 197 above mentioned are members.

8. Immediately upon plaintiff determining to operate in their relations with labor upon the open shop method the said International Association of Bridge, Structural and Ornamental Iron Workers proceeded to attempt to force plaintiffs and other employers engaged in the same industry to operate upon a closed union shop basis, and have been and are continuing their attempts down to the present time. The said union through its representatives have repeatedly stated that it was the purpose to prevent any person being employed by the plaintiffs and other- engaged in the erecting of structural iron and steel or in any other branch of the building industry who was not a member of a union, and force and coercion have been used against plaintiffs and other employers to compel the abandonment of the open shop plan and the adoption of a closed union shop, the purpose being not only to unionize the particular industry within the Metropolitan District but the whole coun- [fol. 8] try and also to unionize the entire building industry within the same limits and extending into Canada. It has been the design and purpose of the American Federation of Labor not only to unionize the building industry but all industry so that over the entire country there can be no labor except by one who shall carry a union card.

9. From time to time after 1906 and down to 1919 the International Association of Bridge, Structural and Ornamental Iron Workers, operating through its affiliation with the unions controlling other branches of the building industry, attempted to force the unionization of the erecting of structural iron and steel. The various building trades were, during the period aforesaid, and are members of a voluntary organization in the City of New York known as the New York Building Trades Council of Greater New York and Long Island, of which in 1919 Robert P. Brindle

was President. Under the rules of the New York Building Trades Council of Greater New York and Long Island none of the workers engaged in the particular branches of the industry represented in said council are permitted to work with non-union employees in any other branch of the industry represented in the counsel. The Building Trades Employers' Association, representing the employers, and the New York Building Trades Council of Greater New York and Long Island, representing the employees, from time to time, negotiated and agreed with respect to the employment of labor throughout the Metropolitan District, and the International Association of Bridge, Structural and Ornamental Iron Workers from time to time brought pressure to bear upon the New York Building Trades [fol. 9] Council of Greater New York and Long Island to compel agreements with the employers which would have the effect of unionizing the erecting of structural iron and steel, and as a means to that end, to so bring it about, that employees engaged in other branches of the building industry would not work with non-union men employed in the erection of structural iron and steel. The result of this pressure was that on December 19th, 1919, the Building Trades Employers' Association assuming to act for the members of said association, which included all the branches of the building industry and with respect to the erecting of structural iron and steel approximately 95 per cent of those engaged in the erecting of structural iron and steel within the Metropolitan District, entered in a contract with the Building Trades Council of New York City, Long Island and Vicinity, assuming to represent apparently all of the trades engaged in the building industry, including carpenters, cement and concrete workers, electricians, stone cutters, structural iron and steel workers, painters, roofers, fitters and others, the purpose of which said contract being that after the 1st of January, 1920, all work within the Metropolitan District, including the work of erecting structural iron and steel should be performed exclusively by union labor. A copy of said agreement is hereto annexed and made a part hereof and marked Exhibit 7. Plaintiffs refused to be bound by the action of said Building Trades Employers' Association upon the ground that the action of the said Building Trades Employers' Association was beyond its power and that said contract was

contrary to public policy and void as tending to create a monopoly in labor, to unduly restrict the free flow of labor [fol. 10] and the right to contract and was a violation of the constitutional rights secured to plaintiffs and to labor generally, and plaintiffs continued to operate upon the open shop method.

10. Thereupon the Unions determined to compel plaintiffs and other- engaged in the same industry to employ exclusively union labor, and one of the methods of intimidation and coercion was the use of threats that if any concern engaged in building operations in the City of New York should use open shop methods therein they would be prevented by the action of the Building Trades Council of New York City, Long Island and Vicinity and the Unions associated and affiliated with it, from obtaining or completing contracts if obtained in any place by the action of labor employed in the allied building trades in refusing to work upon buildings, whether union labor was used exclusively by the contractor upon the particular job or not, upon which said contractor had worked. The Code and By-Laws of the said Building Trades Council of New York City, Long Island and Vicinity, as plaintiffs allege upon information and belief contain the following provisions:

"Sec. 56. Working Cards.—This council shall adopt and issue quarterly working card of uniform character. Said card shall be carried by all affiliated members, and no other card shall be recognized by the trades on any job or building.

"Sec. 57. All members of affiliated organizations are compelled to show their working cards when requested by the Business Agents, or other members working on job irrespective of trade, who is himself in possession of a card.

[fol. 11] "Sec. 58. Non-union Conditions.—Under no circumstances will any organization affiliated permit its members to work with non-union men, or with members of a dual or hostile union, to any Trade represented.

"Sec. 59. Immediate Action.—Wherever or whenever non-union men are found working immediate action shall be taken by the Business agents to enforce union conditions

on all work; any trade connected failing to co-operate when notified of said conditions, shall stand suspended, and can only be reinstated upon payment of one hundred dollars ($100.00)."

11. Notwithstanding the attempts made by the Unions to coerce plaintiffs into adopting a closed union shop by calling out workers and by the use of sympathetic strikes and by intimidating owners of buildings for whom plaintiffs had contracts to perform work by threatening that if plaintiffs were permittted to proceed with the work other trades would not complete the building, plaintiffs have continued down to the present time and intend to continue, if permitted, to operate their business upon the open shop method making no discrimination in the employment of labor between those who are or may not be members of the Union.

11. From 1906 down to the present time the said International Association of Bridge, Structural and Ornamental Iron Workers has been attempting throughout the country, through its various locals and district councils, the country being sub-divided, and there being district councils in control of its various parts, to force employers engaged in the fabricating and the erection of structural iron and steel to operate upon closed union shop methods and have suc-
[fol. 12] ceeded in forcing employers to adopt the closed shop over considerable parts of the country, including such large centers as Chicago, Cleveland, Newark and Jersey City.

12. In pursuance of said conspiracy and as a part thereof and a continuation of the purpose arrived at in 1906 the International Association of Bridge, Structural and Ornamental Iron Workers, District Council of Greater New York and Vicinity and locals Nos. 361 and 40, in the month of April, 1924, demanded that the employers in the Metropolitan District covering the City of New York and the southwestern part of Connecticut, enter into an agreement, a copy of which is hereto annexed and made a part hereof and marked Exhibit 2, which said agreement in terms, provides that employers agree to employ only members who are in good standing in the locals or those who have declared their intentions to become members and which said

agreement further provides for a limitation upon the part of apprentices, and that the foreman and assistant foreman shall be members of the Union, and that piece work shall be forbidden, and that there shall be a shop steward on all jobs who will see to it that all men are in good standing and further provides for a supervision of the work of the employers which, in effect, takes the control of the work out of the hands of the employer, and the right to employ or discharge employees.

12. Plaintiffs refused to agree to said agreement with the result that in order to force plaintiffs to agree all the men who were members of the Union employed by plaintiffs were called out on strike on the 1st day of May, 1924.

[fol. 13] 13. Plaintiffs proceeded to fill the places of those employees who left and notwithstanding the fact that the unions used violence towards employees of plaintiffs and picketed the places at which plaintiffs' work was being done and threatened contractors who employed plaintiffs that if plaintiffs were permitted to perform work, the buildings would never be finished because the sympathetic strikes of the other trades would be called, the plaintiffs continued to operate their respective businesses and about the 1st of September, 1924, all of the places of the strikers had been filled and from that time down to on or about the first of February, 1925, plaintiffs have pursued their business without any difficulty whatever.

14. Notwithstanding the failure of said strike the defendants and each and all of them continued their plan of forcing plaintiffs to employ none but union labor and finally on or about September, 1924, formulated a plan of inducing contractors not to engage plaintiffs for the performance of work and as a means to induce or compel general contractors not to give work to plaintiffs the defendants formed a plan of threatening general contractors that if the plaintiffs did perform any work upon said buildings they, the said defendants would cause strikes to be called of workers engaged in other branches of the building industry and thus prevent buildings from being erected and they also, as a part of their plan, proposed to induce owners and architects not to permit plaintiffs to be employed upon any work and as a means to induce or compel owners or

architects to refrain from permitting work to be performed by plaintiffs, the said defendants and each of them proposed to advise said owners or architects that if said plain-
[fol. 14] tiffs were so employed, they, the said defendants would see to it that other branches in the building industry would not complete the buildings. As a means of carrying out this plan the said defendants arranged that the Daily Dodge work reports should be sent to the New York Office of the said International Association of Bridge, Structural and Ornamental Iron Workers for the information of the various local unions and business agents of said International Association of Bridge, Structural and Ornamental Iron Workers. The reports aforesaid give detailed information from the time that any piece of work is contemplated giving the owner and architects of the proposed work the nature of the building as well as the nature of its construction and the contemplated time of beginning such work. Further carrying out their plan as aforesaid, the said defendant, International Association of Bridge, Structural and Ornamental Iron Workers, upon receipt of such information with respect to work, sent letters to the owners and architects of said proposed work urging them to refuse to permit work upon said proposed buildings to be performed by plaintiffs. Further in pursuance of said plans defendants caused the daily dodge reports to be sent to the New York office of the International Association of Bridge, Structural and Ornamental Iron Workers, which reports showed that bids were being taken upon contemplated work and immediately upon receiving such information the defendants caused representatives to call on the various general contractors, to whom work had been awarded urging them to refrain from giving any part of the work to plaintiffs.

15. The building industry within the Metropolitan District which includes the City of New York and Northern
[fol. 15] New Jersey is so unionized in all of its branches except the erection and construction of iron and steel as that no buildings can be erected unless union labor be employed and no person can obtain employment in the building industry with the exception of the erection of iron and steel except he be a member of a labor organization. Labor is controlled by agreement between the employers

upon the one hand and labor organizations upon the other and these agreements, which cover every branch of the industry with the exception of structural iron and steel, provide for the employment of union labor only. This condition of affairs is notorious and is well known to all owners. When the said defendants approach owners and contractors to induce them to refrain from giving or permitting work to be given to plaintiffs because of the known condition of the building industry, general contractors and owners knew that if they do not obey the request of the said defendants, sympathetic strikes would be called and the buildings would not be completed and plaintiffs charge, upon information and belief, that defendants intended to and did in fact threaten contractors and owners that if they gave work to plaintiffs sympathetic strikes would be called and they would be prevented from completing buildings and that sympathetic strikes also would be called upon other jobs upon which the general contractors might be working or which the owner might be constructing notwithstanding the fact that with respect to those jobs exclusively union labor were employed.

16. Since September, 1924, down to the present time, the defendants and each of them have been and are conducting a boycott of plaintiffs in the manner aforesaid using the [fol. 16] means aforesaid and in order to demonstrate to contractors and builders that the said defendants would and could carry out their threats aforesaid and would and could injure contractors and builders who dealt with plaintiffs on or about the 9th day of February, 1925, caused a strike to be called of the members of Local #170 aforesaid, and of the members of Local #52 aforesaid engaged in the erection of ornamental iron and steel. Neither the members of Local #52 nor the members of Local #170 are employees of plaintiffs nor are they engaged in the erection of structural iron and steel; nevertheless the members of said Locals were ordered to cease work on fire escapes, elevator enclosures, iron stairways and grill work, the hoisting of stone and the installation of boiler tanks and machinery on every job on which the structural iron and steel had been erected by plaintiffs or by any other contractor engaged in the business of erecting structural iron and steel employing the open shop methods in the fabrication and erection thereof and it was publicly announced

by the defendant, Paul J. Morrin, president of the International Association of Bridge, Structural and Ornamental Iron Workers that the said strike activities were directed against plaintiffs and other contractors engaged in the business of erecting structural iron and steel upon the open shop method and that a strike would be called on every job in the Metropolitan Area where employers so engaged in erecting structural iron and steel on the open shop method are handling the erection of steel and plaintiffs say that said strikes were but a preliminary to a nation-wide movement to tie up a million dollars worth of work all over the country and it has publicly announced that if necessary ornamental iron workers, riggers and derrickmen employed [fol. 17] by New York builders, erecting structures in other cities would be called out and it was publicly announced that the executive board of the International union had concluded to take the step of calling said strike after a week of conference and that that board would visit all the large steel centers and would endeavor to unionize these cities so as to prevent any non-union workers coming into the Metropolitan District; that in obedience to said orders, the members of said Local #52 did in fact strike and cease work; and did refuse to perform work on any buildings on which steel and iron had been erected by plaintiffs or by others erecting iron and steel by the open shop method; and thereupon and on or about the 25th day of February, 1925, employers engaged in the erection of ornamental iron and steel filed a suit in the Supreme Court of New York for an injunction against the said union to enjoin the said strike and an order to show cause was allowed with ad interim restraint and therefore and on or about the 26th day of February, 1925, in view of the said injunction the said members of Local #52 returned to work. That said strike was in direct violation of a trade agreement existing between Local #52 and the employers erecting ornamental iron and steel and the sole purpose of the calling of said strike was to aid in the boycott of plaintiffs' and other contractors engaged in the erection and construction of iron and steel by the open shop method; that in the meantime the said defendants have threatened general contractors and builders that if they permit work of erecting structural iron and steel to be performed by plaintiffs or by any other employer operating by the open shop method of construc-

tion the defendants will not permit the completion of the [fol. 18] buildings and will cause sympathetic strikes in other trades to be called. If the defendants are permitted to proceed with their boycotting methods plaintiffs will be irreparably injured; general contractors and builders will not dare give work to plaintiffs; already plaintiffs have been injured and contracts which otherwise would have come to plaintiffs have not come to them and in one instance at least a contract was awarded by an owner to another contractor at a higher price than a contractor erecting structural iron and steel by the open shop method agreed to perform it and the said contract was so let solely because of the threat that if it were not so let the building would not be permittted to be completed by the other trades. If the defendants are permitted to pursue the methods aforesaid their entire investment will be destroyed and they will not be able to carry on their business and the result of that will be that there will be no branch of the building industry left in the Metropolitan District in which a person not a member of a labor union can find employment.

The sole purpose of the activities of the said defendants is to compel a putting into effect the closed union shop in the industry of erecting structural iron and steel and inasmuch as this branch of the building industry is the only branch of the building industry where a person not a member of a labor union can secure employment if successful the entire building industry in the entire Metropolitan District will be closed union.

17. There is no dispute between plaintiffs and the said defendants or the members of the said defendants with respect to wages, hours or working conditions. There is no strike of plaintiffs' employees. Plaintiffs have a suffi- [fol. 19] cient number of employees ready and willing and anxious to work and satisfied with wages, hours and working conditions, and actually working. These men will be thrown out of employment if the said defendants succeed by the methods aforesaid in preventing plaintiffs from obtaining any work to perform.

18. Plaintiffs and each of them are all engaged in interstate commerce and plaintiffs charge that the defendants and each of them have formed and are engaged in a conspiracy in restraint of trade and commerce among the

several states; that plaintiffs' steel used in the erection of buildings in the Metropolitan District in the City of New York and in that portion of the Metropolitan District within the State of New Jersey and in other states of the Union are transported between the several states; that all of the steel used in the City of New York by plaintiffs is transported by plaintiffs from other states; that a portion of the steel used by plaintiffs in the construction in the City of New York and in that portion of the Metropolitan District in the State of New Jersey is bought by plaintiffs in other states and transported by plaintiffs to New York, other portions of said steel are fabricated by plaintiffs without the State of New York and brought into the State of New York for erection and other portions of said steel are purchased by said plaintiffs for delivery in the City of New York from manufacturers without the State of New York and by said manufacturers transported to the City of New York; that the purpose and intent of said defendants is to prevent the use of said steel in the Metropolitan District somewhere and wherever erected by plaintiffs; that the purpose of said defendants is also to monopolize all labor within the Metropolitan District and within the States of New York and [fol. 20] Pennsylvania and New Jersey and throughout the country; that the effect of the success of said defendants will be to destroy the interstate traffic of plaintiffs in steel and will also be to prevent any person not a member of a union from obtaining employment in the building industry; that the purpose of defendants is to compel plaintiffs and all other employers engaged in the construction of structural iron and steel in the territory aforesaid to sign agreements with defendants whereby they will agree not to employ laborers except members of said defendants' unions; plaintiffs charge that the said defendants are therefore engaged in a conspiracy in restraint of trade or commerce among the several states and that the said conspiracy is illegal and the jurisdiction of this court is invoked upon that ground.

19. Plaintiffs say that the activities of the said defendants and each of them are not directed against the plaintiffs separately but against them jointly and also against all other employers erecting structural iron and steel jointly; that the effect of the activities of the said defendants against any one of the plaintiffs is coercive of and destruc-

tive of the rights of the other plaintiffs; that the effect of the threats, intimidation and coercion directed to general contractors and to owners is to injure the plaintiffs jointly and plaintiffs have a common interest in the subject matter of this litigation.

20. Plaintiffs and each of them have determined that for the successful operation of their businesses it is necessary that they should be conducted upon the basis of the open shop, they and each of them are entitled to conduct their businesses as open shop free from any unlawful interfer- [fol. 21] ence from anyone or from coercion exercised by anyone. As citizens of the United States under the 14th Amendment to the Constitution of the United States, they are entitled to all the privileges and immunities of citizens of the State of New York; that among the privileges and immunities of the citizens of the State of New York is secured to them by the Constitution of the State of New York the privilege of acquiring, enjoying and possessing and protecting property and of pursuing and obtaining safety and happiness and of not being deprived of property without due process of law; that as a citizen of the United States under the organic law of the United States and the constitution thereof they are entitled to acquire, possess and protect property and to pursue safety and happiness and under the 14th Amendment to the Constitution of the United States no state may make or enforce any law which shall abridge the laws, immunities or provisions of the United States nor deprive any person of life, liberty or property without due process of law, nor deny to any person within the jurisdiction the equal protection of the law; that to deny plaintiffs relief in the instant case would be to deprive them of their immunities and privileges as citizens of the United States to acquire, possess and protect property and to pursue safety and happiness and any statute of the State of New York or any law of the State of New York or any rule of law of the State of New York, which would deny relief to plaintiffs would be in violation of Article 14 of the Amendments to the Constitution of the United States as abridging the privileges and immunities of citizens of the United States and depriving plaintiffs of property without due process of law and denying to plaintiffs the equal pro- [fol. 22] tection of the law; and any such statute or rule of law is unconstitutional and null and void; that any act of

Congress which would deny relief to the plaintiffs is unconstitutional and null and void and in violation of Article 5 of the Constitution as depriving plaintiffs of property without due process of law; that plaintiffs are entitled to the protection of this Court to protect the rights secured to them by the Constitution of the United States as citizens of the United States as aforesaid and the jurisdiction of this Court is invoked upon this ground; that persons desiring to labor in the building industry who may not be members of a union will, if the activities of the said defendants are successful, be deprived of their rights as citizens of the United States secured to them by the Constitution of the United States to acquire, possess and protect property and to pursue safety and happiness and will likewise be deprived of property without due process of law and will be denied the equal protection of the law secured to them by the 14th Amendment to the Constitution of the United States; that if the activities of the said defendants are successful the owners and builders will likewise be deprived of the rights secured to them by the Constitution of the United States and also the Constitution of the State of New York of acquiring, possessing and protecting property and they likewise will be deprived of private property without due process of law and will be denied the equal protection of the law.

21. Plaintiffs further say that this is a case arising under the Constitution and laws of the United States and the jurisdiction of the Court is invoked upon that ground.

[fol. 23] Plaintiffs are without remedy at common law, as the remedy at common law is wholly inadequate, and the loss and damage to their property will be irreparable and therefore pray:

1. That the defendants, who are Paul J. Morrin, individually and as President of International Association of Bridge, Structural and Ornamental Iron Workers; William J. Wade, individually and as President of Local #40, International Association of Bridge, Structural & Ornamental Iron Workers; Charles McDonald, individually and as President of Local #361, International Association of Bridge, Structural and Ornamental Iron Workers; Ed-

ward Coleman, individually and as President of Local #52, International Association of Bridge, Structural & Ornamental Iron Workers; Arthur Bolton, individually and as President of Local #197, International Association of Bridge, Structural & Ornamental Iron Workers; David Baxter, individually and as President of Local #170, International Association of Bridge, Structural and Ornamental Iron Workers; District Council of New York and Vicinity, International Association of Bridge, Structural and Ornamental Iron Workers; Local #40, International Association of Bridge, Structural and Ornamental Iron Workers; Local #52, International Association of Bridge, Structural & Ornamental Iron Workers; Local #197, International Association of Bridge, Structural & Ornamental Iron Workers; Local #361, International Association of Bridge, Structural & Ornamental Iron Workers; Local #170, International Association of Bridge, Structural & Ornamental Iron Workers; John Snyder, Henry C. Wolf, Owen J. O'Brien, William P. McGinn, Patrick Farrell, Charles Massey and Earl Calvert, may answer this bill [fol. 24] and each statement therein contained without oath.

2. That it may be adjudged and decreed that the acts of the defendants mentioned in the above bill are illegal.

3. That the defendants, and each of them, their agents, servants or employees and all others associated with them be perpetually enjoined:

a. From combining or conspiring to compel the said plaintiffs in the prosecution of their work of fabricating and erecting structural iron and steel to employ in the performance of such work only members of a labor union and to refrain from employing any person or persons not members of a labor union.

b. From intimidating, coercing, inducing or advising any person or persons whomsoever to refrain from engaging plaintiffs to perform work.

c. From conducting a boycott of plaintiffs and from inducing or advising a boycott of plaintiffs.

d. From calling, inducing or advising sympathetic strikes.

e. From interfering with, hindering or obstructing plaintiffs' businesses and the operation of plaintiffs' businesses in any manner whatsoever.

f. From doing any act or things whatever to restrict plaintiffs from the free and unhindered control and conduct of plaintiffs' businesses.

g. From ordering, commanding, directing, assisting, aiding or abetting in any manner whatever, any person or persons from committing or attempting to commit any of the aforesaid acts.

[fol. 25] 3. That temporary restraint as aforesaid pending the determination of this cause and the further order of this Court be granted to plaintiffs.

4. That proper prayer for process issue.

Edward Maxson, Attorney for Plaintiff. Merrit Lane, of Counsel.

EXHIBIT 1 ANNEXED TO COMPLAINT

Circular Letter No. 257

Building Trades Employers' Association, 30-34 West 33rd Street, New York

December 19, 1919.

To the members of the Association.

GENTLEMEN: The Board of Governors, on December 17th, 1919, approved the agreement entered into between the Building Trades Employers' Association and the Building Trades Council of the City of New York, as submitted by its Committee, and rescinded all orders in conflict with the agreement. The rescinding order stakes effect on January 1st, 1920. The Board also made the agreement an order of the Board of Governors and directed every member of the association to comply therewith.

Respectfully, Sam'l B. Donnelly, Secretary.

[fol. 26] The agreement reads as follows:

In order to secure continuity of employment and uninterrupted production, it is hereby agreed between the Building Trades Employers' Association of the City of New York and the Building Trades Council of the City of New York, representing and having authority to act for

Art Glass Workers,
Asbestos Workers, Heat and Frost Insulators' Union,
Blue Stone Cutters and Helpers, New York Branch,
United Brotherhood of Carpenters and Joiners of America, District Council of New York and Vicinity;
United Cement Masons' Union, Local 570, O. P. and C. F. I. A.,
Cement and Concrete Workers (Laborers),
Composition Roofers, Damp and Waterproof Workers, Local #4;
Electrical Workers' Union, Local No. 3, I. B. E. W.;
Electrical Workers' Helpers,
Elevator Constructors' Union, Local No. 1;
Elevator Constructors' Helpers,
Granite Cutters, New York Branch, International Association;
United Portable Hoisting Engineers, Local No. 403;
Dock Builders, House Shorers and Sheathpilers, Local No. 1456;
Housesmiths and Bridgemen, Local No. 40;
Housesmiths' Finishers, Local No. 52;
Housesmiths' Helpers,
Marble Cutters, Carvers and Setters, Local #4, B. M. and P. I. U.;
Marble Polishers, Bed Rubbers, Sawyers, Whitestone Association,
Marble Cutters' Helpers, Riggers, Crane and Derrickmen,
Mosaic and Terrazzo Workers' Association,
[fol. 27] Mosaic and Terrazzo Workers' Helpers Association,
Metallic Lathers' Union,
Brotherhood of Painters, Decorators and Paperhangers of America, New York District Council No. 9 and Brooklyn District Council, Queens District Council, Richmond District Council;

Plasterers, Local- Nos. 60, 30, 314 and 408;
Plumbers and Gasfitters, Local No. 463, of Manhattan and the Bronx, and the Brooklyn, Queens and Richmond Locals;
Roofers and Sheet Metal Workers, Local No. 28;
Steam and Hot Water Fitters, Enterprise Assn., Local No. 638;
Steam and Hot Water Fitters' Helpers, Progress Assn., No. 639;
Tile Layers' Union, Local No. 52;
Tile Layers' Helpers, Local No. 53;
Upholsterers District Council;
Wood Lathers' Union, Local Nos. 308 and 6.

That—

(1) The working week shall consist of forty-four (44) Hours.

(2) The rates of wages from January 1st, 1920, to December 31st, 1921, inclusive, shall be as follows:

	Per day 8 hours
Art Glass Workers	$7.00
Asbestos Workers and Insulators	8.00
Blue Stone Cutters	8.00
Carpenters	8.00
Dockbuilders, House Shorers and Sheathpilers	7.50
Cement Masons	8.00
*Cement and Concrete Workers (Laborers)	
[fol. 28] Composition Roofers and Waterproofers	7.00
Do. (Foremen)	7.50
Electrical Workers	8.00
Electrical Workers' Helpers	4.50
Elevator Constructors	8.00
Elevator Constructors' Helpers	6.00
Granite Cutters	8.00
Hoisting Engineers, by the Week	46.75
Hoisting Engineers, by the Day	9.00
Hoisting Engineers, running Compressors extra per wk.	7.00
Housesmiths and Bridgemen, Local No. 40	8.00
Housesmith's Finishers, Local No. 52	8.00

* Now being adjusted.

	Per day 8 hours
Housesmith's Helpers	6.00
Marble Cutters and Setters—April 1, 1920	8.00
Marble Carvers—April 1, 1920	9.00
Marble Polishers, Bed Rubbers & Sawyers, Apr. 1, 1920	7.50
Marble Cutters' Helpers, Riggers, Crane & Derrickmen	6.00
*Mosaic and Terrazzo Workers' Helpers	....
Mosaic and Terrazzo Workers	7.00
Metallic Lathers	8.00
Painters and Decorators	8.00
Plasterers	8.50
Plasterers' Laborers	6.00
Plumbers and Gasfitters	8.00
Roofers and Sheet Metal Workers	8.00
Steam and Hot Water Fitters	8.00
Steam and Hot Water Fitters' Helpers	6.00
Tile Layers	8.00
Tile Layers' Helpers	6.00
Upholsterers	9.25
Wood Lathers	8.00

Provided, should the cost of living materially change, upon five months' notice from the Building Trades Coun- [fol. 29] cil or the Building Trades Employers' Association given prior to January 1, 1921, the wage schedule for the calendar year 1921 shall be reopened and readjusted by the representatives of the parties hereto.

(3) The existing trade agreements between the several trade associations, members of the Building Trade Employers' Association and the Unions of their respective trades shall be continued upon their present terms and conditions until the expiration of this agreement, unless changed by the mutual consent of the parties hereto, except, that the working week and the wage schedule herein agreed upon shall not be changed, except as herein provided for.

(4) Regular or consecutive overtime shall not be worked unless permission to do so shall have been given by a Joint Committee, consisting of the Chairman of the Board of

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* Now being adjusted.

Governors of the Building Trades Employers' Association and the Chairman of the Building Trades Council; provided, that this shall not apply to occasional overtime made necessary by the exigencies of the work.

(5) The unions as a whole or as a single Union shall not order any strike against a member of the Building Trades Employers' Association, neither shall any number of Union men leave the work of a member of the Building Trades Employers' Association, nor shall any member of the Building Trades Employers' Association lock out his employees; and, should any Union or the members of any Union violate this agreement and the violation is not discontinued within one week from the time notice of said vio- [fol. 30] lation is sent to the Building Trades Council, it shall not be considered a violation of this agreement or of any trade agreement if the Building Trades Employers' Association or any member or members thereof proceed to man the work with such men as can be secured, or, in case such violation, if the Building Trades Employers' Association lock out the members of the defaulting Union or declares a general cessation of work. It is further agreed that if workmen not members of the Unions parties hereto are alleged to be employed on any job whereon any member or members of the Building Trades Employers' Association are doing work, it shall be brought immediately to the attention of the Board of Arbitration hereinafter provided for, and if the facts are found by said Board to be as alleged, it shall not be deemed a violation of this agreement, or of any trade agreement, for any member of the Unions above mentioned to refuse to work on the job in question, unless such workmen are justifiably employed in the case above provided for, that is, where a union or a number of members of a union have first violated this agreement.

(6) A permanent Board of Arbitration shall be established, said Board to consist of five members of the Executive Committee of the Board of Governors of the Building Trades Employers' Association and five members of the Executive Committee of the Building Trades Council, to whom shall be referred all disputes that may arise relative to alleged violations of this agreement or the intent and meaning of any part thereof. The decision of said

Board of Arbitration upon any matter submitted to it shall be final and binding upon all parties hereto, and, should said Board of Arbitration fail to agree after three consecu- [fol. 31] tive daily meetings, said Board of Arbitration shall select an umpire, and each side shall make its arguments before the umpire, and his decision shall be final and binding upon all the parties hereto.

(7) This agreement shall apply upon all work performed within the geographical limits of Greater New York and Long Island and in such additional territory as is included in the provisions of the existing trade agreements between the several trade associations and employers and the unions of their trades.

(8) The Union parties to this agreement agree to furnish at all times sufficient men to man the work of the members of the Building Trades Employers' Association.

Dated New York, November 20, 1919.

Signed for the Building Trades Employers' Assn. by Chas. J. Kelly and G. G. Norman.

Signed for the Building Trades Council by Robert P. Brindell, President; John C. Imhof, Michael J. McCluskey, Albert F. Day, William H. Chapman, David Danahy, Richard Pike, John T. Tagghart, Patrick Crowley.

[fol. 32] EXHIBIT 2 ANNEXED TO COMPLAINT

Joint Agreement of Local Union No. 361 and Local Union No. 41

International Association of Bridge, Structural and Ornamental Iron Workers of Greater New York and Vicinity

It is hereby agreed by and between —— —— and Local Unions No. 361 and No. 40 that the conditions governing the handling and erection of structural steel, and all other work within the jurisdiction claims of this organization shall be as follows:

Article 1. Employers agree to employ only members who are in good standing in either Local or those who have de-

clared their intentions of becoming members of same. In event of Union being unable to supply the required number of men to the employer, he shall be at liberty to employ such men as may qualify as mechanics who are willing to become members, after meeting all requirements of Union. Employers representative to advise the union at least forty-eight (48) hours in advance of his need of additional men and no workman shall be discriminated against because of his connection with this Union.

Article 2. Eight hours shall constitute a day's work, the hours of labor shall be between (8) o'clock and five (5) o'clock P. M. except on Sat. when the hours shall be from eight (8) to twelve (12) o'clock noon. It shall be optional with the employer and the employee whether the lunch hour be one hour or one-half hour.

[fol. 33] Article 3. Employers shall be at liberty to hold not more than two (2) and one-half days of a man's wages to enable the employer to prepare the pay roll.

Article 4. Employers agree to pay the men's wages due them weekly on a regular pay day. If on Sat. the men's wages due them must be paid not later than twelve o'clock noon. If any other working day the men's wages due them must be paid not later than five (5) o'clock P. M. on the job. If men are compelled to go from the job they are working on to the office of the employer for wages due them they shall be paid for their time and carfare. When the men are compelled to wait for wages due them after the hours stated above, they shall be paid double time rate of wages for the length of time they are compelled to wait after the regular stated hour of the regular stated pay day. Men must be paid in legal currency only.

Article 5. Holidays or days observed as such: New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day and Sat. twelve (12) o'clock noon until Monday morning eight (8) A. M. The scale of wages for labor done on these days shall be paid for at the rate of double time, no labor shall be performed on Labor Day by members of either Local.

Article 6. Apprentices shall be allowed at the rate of one apprentice to every seven mechanics and his duties shall be such work as will enable him to become a skilled mechanic, but under no consideration will he be allowed to [fol. 34] have charge of any part of the work, such as handling plans or issuing orders, and it is understood that no apprentice shall be employed by an employer who has not the required number of mechanics in his employ.

Article 7. Men who quit on any job for any employer shall wait for money due them until the regular pay day. Members of either Local on being discharged or laid off, shall be paid in full immediately or at the office of the employer if located in New York City. Any member failing to receive his money after such discharge or lay off, shall receive waiting time at the rate of straight time, providing he shall report to job while waiting for money due him and must report to Financial Secretary at once. Men who are discharged or laid off shall be given a written statement of wages due them by the foreman and shall be allowed one hour if compelled to go to the office for his money.

Article 8. There shall be a foreman on each job. Foreman and assistant foreman shall be members of this Union. Foreman and assistant shall be paid straight time and receive their pay for all hours over eight hours at the rate of double time. They shall be paid for all holidays or all days observed as such. All foremen to receive at least three dollars per day more than the men and all assistant foremen at least one and one-half dollars per day more than the men.

Article 9. This Union forbids piece work of all kinds.

Article 10. The scale of wages shall be as follows: Men [fol. 35] classed as Bridge and Structural workers shall receive $1.50 per hour. Men classed as apprentices shall receive $1.00 per hour.

Article 11. There shall be a steward on all jobs, who will see that all men are in good standing; any grievance arising on the job the steward will take the matter up with the superintendent. If it cannot be settled will call for business representative, who shall use all means to adjust all grievances without stopping the work. The business repre-

sentative to be allowed at all times on the job. First man working on any job must report same to the Secretary.

Article 12. Men shipping out shall receive traveling time and expenses. All members who are shipped out to a job through the offices of either Local and fail to live up to the agreement or refuse to work of their own accord shall be held responsible by same. The employer shall be reimbursed with the actual expense in each case by the Union.

Article 13. Where there are two or more shifts on one job, the hours between five (5) P. M. and eight (8) A. M. shall be paid for at the rate of double time.

Article 14. When any member of either Local is told to report for work and after reporting for work through no fault of his own the foreman fails to put him to work, he shall receive two hours pay. When the workmen are sent yard or job they shall be paid for time consumed in such trip and carfare. When members are employed beyond the city limits they shall be paid all additional carfare and be allowed one hour extra pay for traveling time.

[fol. 36] Article 15. This agreement shall apply to all men employed in the erection and construction of all steel and cast iron structures, viz.: Bridges and viaducts, stringing temporary or permanent cables for suspension bridges, steel stack, steel coal bunkers, ash coal and ore conveyors, any conveyors or main chute, car dumper, jail and cell work, steel grain elevators and tanks, steel stand pipes, steel water tanks, vat works, iron and steel bulkheads, steel towers, blast furnaces, including shiphoists, toprigging, ash pans, ash chutes, hoisting and erection of all stokers. All structural work pertaining to building or in support of boilers including foundation beams, columns, beams or girders, mullions, steel ducts and steel buildings. Also any work required to change or alter in the field material shipped from the shop, such as framing, cutting or drilling. Corrugated steel work when attached to steel frames, the handling and operation of derrick or excavation work which are to be used later for the erection of steel.

The erection and removal of necessary false work, derricks and travelers and steel scaffolding. The moving and placing of heavy machinery on bridges and buildings. The handling of derricks at all storage points, all burning and

welding machines used in construction or alteration of buildings or bridges. The erection of all signs, vaults and safety deposit boxes and dismantling of same and all other work pertaining to same. Also wrecking of bridges, metal lumber, viaducts and steel buildings, and all concrete reinforcement. All guide frames on gasolmeters and all blacksmith work pertaining to same, all lintels on buildings and enamel steel tanks.

[fol. 37] Article 16. The territory covered by this agreement shall be Brooklyn and Long Island, Staten Island and New York, the joint territory of Local Unions No. 361 and No. 40 within a radius of seventy-five miles (75) from City Hall, New York City, New York State.

This agreement to take effect on and after —— —, ——.
Local No. 361, —— ——. Employer, —— ——.
Local No. 40, —— ——.

[fols. 38-42] *Duly sworn to by John L. Hay, Jr. Jurat omitted in printing.*

[fol. 43] In United States District Court

[Title omitted]

Answer

To the Honorable the Judges of the United States District Court for the Southern District of New York:

Defendants, Paul J. Morrin, individually and as President of International Association of Bridge, Structural & [fol. 44] Ornamental Iron Workers, William J. Wade, individually and as President of Local #40, International Association of Bridge, Structural & Ornamental Iron Workers, Charles McDonnell (impleaded as Charles McDonald), individually and as President of Local #361 (impleaded as Local #381), International Association of Bridge, Structural & Ornamental Iron Workers, Edward Coleman, individually and as President of Local #52, International Association of Bridge, Structural and Ornamental Iron Workers, Arthur Bolton, David Baxter, individually and as Presi-

dent of Local #170, International Association of Bridge, Structural & Ornamental Iron Workers, Owen J. O'Brien, William P. McGinn, Patrick Farrell, Charles Massey, and Earl Calvert answering the bill of complaint of the plaintiffs above named, by Frank P. Walsh, their attorney:

1. Deny any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraphs 1, 2, 3, and 4 thereof, except the allegations in each of said paragraphs that the plaintiffs therein named is engaged in the fabricating and erection of structural iron and steel.

2. Defendant, Arthur Bolton, denies the allegations contained in paragraph 5, that he is President of Local #197, International Association of Bridge, Structural & Ornamental Iron Workers, and denies the allegation that he is a resident, citizen and inhabitant of the State of New York, and alleges that he is and on March 11, 1925, was a resident, citizen and inhabitant of the State of New Jersey.

3. Defendant, Charles McDonnell (impleaded as Charles McD ald), denies that he is President of Local #381, as stated in the caption of the complaint in this action.

[fol. 45] 4. Defendant, William P. McGinn, denies the allegation contained in paragraph 5, that he is a resident, citizen and inhabitant of the State of New York, and alleges that he is a resident, citizen and inhabitant of the State of Massachusetts.

Defendants further answering:

5. On information and belief deny the allegation contained in paragraph 6, that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00.

6. On information and belief deny the allegations contained in paragraph 7, except the allegations as to the makeup of the different locals in New York and vicinity (said allegations beginning "It is made up of different locals" and continuing to the end of the paragraph).

7. On information and belief deny each and every allegation contained in paragraph 8.

8. On information and belief deny the allegations contained in paragraph 9, that defendant International Association, and its affiliated unions attempted to force unionization; deny the allegations thereof that defendants brought pressure to compel agreements with employers; and as to the residue of the allegations therein contained, aver, on information and belief, that said allegations are wholly immaterial.

9. On information and belief deny the allegations contained in paragraph 10, that the unions determined to compel plaintiffs and others and used the threats mentioned therein.

10. Deny any knowledge of information sufficient to form a belief as to the allegations contained in paragraph 11.

[fol. 46] 11. On information and belief deny each and every allegation contained in the second paragraph marked 11.

12. On information and belief deny the allegations contained in paragraph 12, as to the conspiracy and demands pursuant thereto, therein alleged.

13. On information and belief deny the allegations contained in the second paragraph marked 12, except the allegation that plaintiffs refused to agree to the agreement therein mentioned.

14. On information and belief deny the allegations contained in paragraph 13, except the allegation that plaintiffs proceeded to fill the places of their employees who left.

15. On information and belief deny the allegations contained in paragraph 14, to the effect that the strike of May, 1924, failed, that defendants continued any plan of forcing plaintiffs, that defendants formulated the plan of threatening general contractors and in this behalf allege, that the strike did not fail but still continues; that the use of the Dodge Daily Reports and letters soliciting patronage of owners and architects for employers of union labor therein mentioned was and is legitimate and lawful.

16. On information and belief deny the allegations contained in paragraph 15, as to the calling of sympathetic

strikes and threats by defendants and, on information and belief aver that the other allegations therein are immaterial.

17. On information and belief deny the allegations contained in paragraph 16, touching the conducting of a boycott and strike by defendants and public announcement by [fol. 47] defendant, Paul J. Morrin, and deny the allegation that the strike of members of Local #52 was in violation of the trade agreement and for the purpose therein mentioned; deny that the defendants threatened general contractors and builders as therein alleged; deny that plaintiffs will be irreparably injured; that general contractors and builders will not dare give work to plaintiffs and that plaintiffs have already been injured; and deny the allegations touching the destruction of the entire building industry in the Metropolitan District, and as to the residue of allegations therein contained, on information and belief, aver that the same are immaterial.

18. On information and belief deny the allegations contained in paragraph 17, except that defendants have no knowledge or information sufficient to form a belief as to the allegations that plaintiffs have a sufficient number of employees, as alleged.

19. On information and belief deny the allegations contained in paragraph 18, that defendants have formed and are engaged in the conspiracy therein alleged and deny the allegations to the effect that the purpose of defendants is to monopolize all labor as alleged therein; deny the allegations therein that the success of defendants will destroy the inter-state traffic of plaintiffs in steel and will prevent any person from obtaining employment in the building industry and in this behalf allege that the acts of defendants mentioned in the complaint herein are wholly intra-state transactions and have no relation whatever to inter-state commerce, and, on information and belief, aver that the allegations contained in paragraph 18, touching the alleged [fol. 48] conspiracy or restraint of trade or commerce among the several states and the destruction of inter-state traffic of the plaintiffs in steel, are entirely false and embodied in the complaint without the slightest cause or reason therefore and only for the ulterior purpose of imposing upon this court.

20. On information and belief deny each and every allegation contained in paragraph 19.

21. Deny any knowledge or information sufficient to form a belief as to the allegations contained in paragraph 20, as to what plaintiffs have determined to be necessary to the successful operation of their business and deny "that it is necessary that the business of plaintiffs should be conducted upon the basis of the open shop"; deny the allegations therein that to deny plaintiffs relief herein would deprive them of their immunities and privileges as citizens of the United States or of the State of New York; deny the allegation therein contained as to the effect of any rule of law of the State of New York, which will deny relief to plaintiffs is unconstitutional; deny that if defendants are successful the owners and builders will be deprived of any of their constitutional rights; and as to the residue of the allegations therein contained, on information and belief, aver that said allegations are wholly immaterial and are imported into the complaint only with the view to imposing upon the court through an effort to raise a false and meretricious issue whereby plaintiffs hope to invoke and secure Federal Court jurisdiction, with the possibility of securing thereby a temporary injunction, which they may publish to the world and use against the members of defendant, International Association to terrorize them through the implied threat of contempt pro-
[fol. 49] ceedings and to disrupt and disorganize defendants' organization International Association, before a trial herein can be had, the charges of plaintiffs disproved, and the defendants relieved of the injunction order thereby sought.

22. On information and belief deny the allegations of paragraph 21, that this action arises under the constitution and laws of the United States, and the allegation therein that plaintiffs are without remedy at common law, that the remedy at common law is wholly inadequate and the loss and damage to plaintiffs' property will be irreparable.

For a second and separate defense and by way of objection for want of parties plaintiff herein, allege, on information and belief:

23. That the parties plaintiff herein are not the real parties in interest in that said plaintiffs are only a few of the employers of members of defendant, International Association, in the United States and especially in Greater New York and vicinity, and that all said employers are united in interest with the four plaintiffs named herein and are and for many years have been engaged in a conspiracy against defendants with the object and purpose of destroying the national, district and local organizations of defendants, crushing the union labor movement in the Iron and Steel industries (especially the fabrication and erecting of bridge, structural and ornamental steel and iron work throughout the United States) and substituting therefor what is known as the open or non-union shop. That said employers are and for many years have been organ- [fol. 50] ized into national and local associations, among which are the National Steel Fabricators Association, the Bridge Builders and Structural Society, the Structural Steel Society, the American Erectors Association, the National Erectors Association, and the Iron League of New York (which until July, 1920, was known as the Iron League Erectors Association). That said National Erectors Association is a national organization of employers engaged in the manufacture and fabrication and erection of steel throughout the United States, having its office in the City of New York and district offices in Pittsburgh, Cleveland, Kansas City, Milwaukee and Philadelphia, and includes among its members many of the largest and most influential concerns in the industry, the names of all of its members being unknown to defendants. That the Iron League of New York is an unincorporated association of seven or more members, employers of labor engaged in the erection of iron and steel in Greater New York and vicinity, and that among its members are the following plaintiffs in a certain action instituted in the New York Supreme Court, New York County, on or about June 8th, 1924, and entitled:

[fol. 51] Supreme Court, County of New York. Post & McCord, Inc.; Levering & Garrigues Company; George A. Just Company; Easton Structural Steel Company; Harden Contracting Company; Facey Erection Company; Hay

Foundry & Iron Works; Hinkle Iron Company; Communipaw Company; Harris Structural Steel Company; Hedden Iron Construction Company; McClintock-Marshall Company; Alfred E. Norton Company, Inc.; Eidlitz & Ross, Plaintiffs, against Paul J. Morrin, individually and as president of International Association of Bridge, Structural and Ornamental Iron Workers; William J. Wade, individually and as president of Local No. 40, International Association of Bridge, Structural and Ornamental Iron Workers; Charles Massey, Charles A. Howard, Charles McDonnell, individually and as President of Local No. 361, International Association of Bridge, Structural and Ornamental Iron Workers; Theodore M. Brandle, individually and as president of District Council of New York and vicinity, International Association of Bridge, Structural, and Ornamental Iron Workers; John Lingen; Patrick J. Commerford, Earl Calvert, Victor Gosselin and John J. Donnelly, Defendants,

and that each of the members of said Association, and especially the parties hereinbefore named as members of the Iron League of New York, plaintiffs in said Post & McCord action, are members of National Erectors Association [fol. 52] in Greater New York and that each of said parties is united in interest in the matters of the complaint with the four plaintiffs named therein; that said four plaintiffs were named as such, as a part of the conspiracy of all said parties with the purpose of imposing upon this Court, by the use of said plaintiffs through the alleged diversity of citizenship herein, whereas plaintiffs well knew that if all th real parties in interest were joined as plaintiffs herein, the Unted States District Court would be deprived of jurisdiction of the controversy; and that all said employers are proper and necessary parties to this action and if any of them decline to come in as plaintiffs, they should be made parties defendant herein.

24. On information and belief that all said employers are engaged in one or more branches of the steel and iron industry and are large employers of labor in the various branches of said industry comprehended within the jurisdiction of defendant, International Association, accorded to it as an International Labor Union Organization by the American Federation of Labor. That all said employers

have a common purpose in the organizations hereinbefore mentioned to oppress and destroy defendant, International Association, as a prime prerequisite to the general establishing of an open or non-union shop plan toward which their concerted efforts are directed; and that through the various associations hereinbefore mentioned said employers are contributing of their funds and the personal activities of their officers and agents, toward the attainment of that end.

25. The reason why the presence of said parties is required in this suit is that each of said parties is interested [fol. 53] in and a member of the conspiracy against defendants hereinbefore mentioned and that without their presence herein complete justice cannot be done in the premises.

26. On information and belief each and every employer herein mentioned is in every aspect hereof an indispensable party hereto for the reasons hereinbefore mentioned.

27. On information and belief the parties mentioned as plaintiffs in the Post & McCord action, hereinbefore mentioned, have offices in the City of New York, and are actively engaged in business in the city and State of New York, and are within the jurisdiction of this court.

For a third and separate defense:

28. Defendants repeat and re-allege the allegations contained in the foregoing Second and Separate Defense and further allege that the parties plaintiff herein have been improperly and collusively made and joined as parties plaintiff for the purpose of creating a case cognizable under the Judiciary Code and with the purpose of persuading this court that the four parties plaintiff herein named as such are the only parties aggrieved by the acts alleged against defendants in the complaint, although the plaintiffs have, apparently, unwittingly, admitted that "all other employers erecting structural iron and steel" are interested with them, as appears by the allegations of paragraph 19 of the complaint, wherein plaintiffs also allege.

"That the effect of the activities of the said defendants against any one of the plaintiffs is coercive of and destruc- [fol. 54] tive of the rights of the other plaintiffs, that the

effect of the threats, intimidation and coercion directed toward general contractors and to owners is to injure the plaintiffs jointly and plaintiffs have a common interest in the subject matter of this litigation" (see complaint, paragraph 19);

wherefore defendants aver and verily believe that the jurisdiction of this court has been imposed upon by the collusion of the parties plaintiff and the other parties hereinbefore mentioned as members of said organization of employers; and humbly pray this court to make the necessary inquiry into the verity of the matters herein alleged either by having the proper issue joined and tried, or by some other appropriate form of proceeding and "act as justice may require for its own protection against fraud or imposition" (Hartog vs. Memory, 116 U. S. 588).

For a fourth and separate defense:

29. On information and belief allege that another motion is pending in the New York Supreme Court, New York County (the title whereof is set forth at length in paragraph 23 hereof) wherein the parties plaintiff herein are plaintiffs along with ten other employers in the steel and iron industry in Greater New York and vicinity, all of whom are members with the plaintiffs herein of the Iron League of New York, and as such members co-operating with plaintiffs herein in litigating the matters in controversy in said action. That the defendants in said action are virtually (and, indeed, almost literally) identical with the defendants herein—in both cases said defendants being the International Association and its local unions, together [fol. 55] with sundry business agents and representatives of said organizations.

30. On information and belief that, in essence, the issues involved in said Post & McCord action are the same as in the instant case; that both actions grow out of the same controversy among the same parties, over disputes connected with operations in the same industry in the same city and the same territory; involving on the part of plaintiffs in both actions, the same ultimate purpose, namely; to disrupt and destroy defendants' labor union organization and thus enable plaintiffs to substitute open shop, non-union labor

for the existing union labor conditions; and the same injunctive restraint upon the same parties defendant, their officers and members—the only variation, in fact, being that to the demands for injunction against strikes, threats, violations, intimidations and coercion embodied in both complaints, plaintiffs have thrown in as a make-weight, allegations of boycott and prayers for injunctive relief thereupon, but defendants aver that upon any fair analysis of the complaints and answers in said actions, it will readily apppear that said boycott allegations are gratuitously imported into the complaint herein and are merely a subterfuge whereby plaintiffs seek to impose upon this court through the securing of action favorable to them, well knowing that had they submitted the allegations of the complaint herein to the New York Supreme Court in the action therein pending, wherein they are plaintiffs and wherein all the allegations herein are properly cognizable and can readily be brought in by motion, amended complaint or otherwise, they would certainly have failed to secure the relief herein demanded, as in said New York Supreme Court action the plaintiffs (including plaintiffs [fol. 56] herein) were twice refused the temporary restraining order therein sought and upon a full hearing upon voluminous affidavits and briefs on both sides were refused the injunction pendente lite therein sought, the Court in its opinion saying:

Opinion of Hon. Richard P. Lydon, Justice of the Supreme Court of the State of New York, Rendered July 24, 1924

"Post & McCord, Inc., et al., v. Morrin, etc., et al.—The plaintiffs in this action make an application for an injunction pendente lite. The plaintiffs herein with a number of other corporations, are members of the Iron League, and their business is that of erecting structural steel. The defendants are certain labor union organizations. The plaintiffs claim that their business is being interfered with by the members of the defendants' unions and that there is a conspiracy on hand to injure and destroy the plaintiffs' trade and business and to compel the plaintiffs to enter into closed union shop agreements for the purpose of compelling the employment of none but union men in the industry of erecting iron and steel in the metropolitan district. The

plaintiffs further claim that crowds of men who are members of the defendants' unions gather about the plaintiffs' respective jobs, notwithstanding the fact that the jobs are all picketed by the defendants' unions, and that these crowds threaten the workmen on plaintiffs' jobs with violence if they continue to work for the plaintiffs. Furthermore, that similar crowds have gathered about the hotel where some of the plaintiffs' employees were lodged and that they hoot and shout at the men and threaten them with personal violence if they continue to work for the plaintiffs. [fol. 57] That the defendants further interfered with the transportation of the men from the hotel to the work by holding up the taxicabs and other conveyances and so threatened the chauffeurs that they refused to carry the men to the jobs. There are also three or four cases of alleged personal assault or violence, but the evidence submitted to sustain the proof of such personal violence is not only very weak but is substantiallly disposed of by the opposing affidavits of defendants. The defendants make a counterclaim against the plaintiffs and allege that these plaintiffs have organized themselves into the Iron League, and that their only purpose of organization is to destroy the defendants' union, as the said Iron League will not enter into agreements with the unions by which it would be obliged to employ only union labor. The defendants further point out that the said Iron League is in cooperation with the great steel mills and that by reason of the refusal of the Iron League to contract to employ union labor the said steel mills grant them a rebate of $6.00 a ton on the purchase of steel to be erected within the metropolitan district. It is further claimed that the said Iron League maintains a large force of detectives, who act as spies upon the defendants' unions, who under the guise of interested workmen enter the defendants' unions to foment trouble and discord; that these spies seek to incite violence and unlawful acts on the part of the members of these unions. It is also alleged by the defendants, and it is undisputed, that every other branch of the building trade has signed contracts with the unions and that the plaintiffs have entered into contracts with every other union in relation to building operators, the sole exception being the defendants' unions and relating exclusively to the erection of structural steel, [fol. 58] and the defendants claim that this disproves the

plaintiffs' assertion that they are merely advocating the open shop, while the demand of the defendants is for the same conditions as those now enjoyed by their fellow workmen in other trades. There is no evidence of any probative force in the moving affidavits to show that the pickets on the different jobs were guilty of any violence or in any way substantially interfered with the plaintiffs' business. The principal complaint of the plaintiffs is as against the congregating of a number of the union men at different places who intimidate plaintiffs' employees and interfere with the plaintiffs' work. In many instances the members of the defendants' unions had heretofore worked on the plaintiffs' several jobs, but some weeks ago those union men were called off the job, and the defendants claim that a strike exists, which is denied by the plaintiffs. The numerous affidavits submitted by the plaintiffs alleging this congregation of men acting in a way to intimidate plaintiffs' employees, as well as tending to cause a breach of the peace, are met by numerous affidavits of the defendants, made by persons who were at the several respective places where these crowds of union men are alleged to have congregated, and these affidavits state that no such thing occurred as is alleged in the moving affidavits and that no disturbance was created. To sum up the claims of the parties, the plaintiffs contend that if they do not get this injunction pendente lite their business is liable to come to a standstill, as they will be unable to employ labor; on the other hand, the defendants claim that the plaintiffs through this injunction are seeking to tie the hands of the defendants' unions with the view of absolutely destroying them and they further claim that they have a perfect right to [fol. 59] picket these jobs and to peaceably persuade any workman in the employ of the plaintiffs to join their union. On the argument it was frankly admitted by defendants' counsel that for months these two opposing agencies, to wit, the Iron League on one side and the unions on the other, have been bitterly fighting each other and have been trying through a system of espionage to get all the information possible which might be detrimental to the other and that this was a fight to the death. Picketing is lawful when lawfully conducted. I do not find any charge in the affidavits which would support a finding that the pickets exceeded their rights as such. The members of the defendants'

unions have a perfect right to refuse to work with non-union men, and non-union men, on the other hand, have the right to work when and where they please. It is true that it has been held by the Courts in certain cases where violence has been shown to have occurred that even when the moving affidavits upon an application for an injunction are substantially denied by a defendant that nevertheless the Court will grant an injunction pendente lite, but in this case the few instances of alleged violence have not been substantiated by proof of sufficient probative force. The affidavits are so conflicting in this case that I hesitate to dispose of the matter summarily upon such a state of facts, because it was practically admitted upon the argument that the granting of an injunction pendente lite would be tantamount to a determination in advance of the trial of the issues herein involved. Having this in mind, coupled with the fact that the courts will be in recess for about two months more before the trial parts resume, an effort was made by the Court to have the parties herein agree to an [fol. 60] immediate reference of the whole issue. The defendants were agreeable to this proposition, but the plaintiffs refused to consent in view of the condition of the pleadings. There are some vital issues in this case raised by the defendants, and it may be that the defendants' contention that the plaintiffs do not 'come into Court with clean hands' may be sustained upon the trial. As was said in the case of Fay v. Lambourne (124 A. D. 245): 'Equity does not adjust the differences between rogues. The complainant is first judged, and not until he has been found free from taint does equity proceed to determine whether or not he has been wronged.' The question as to whether or not the plaintiffs are, as alleged by the defendants, engaged in a conspiracy to destroy the defendants is clearly raised by the papers on this motion, and if established would be decisive of the fact that the plaintiffs are not entitled to come into equity for relief.

The papers before me create a doubt in my mind as to the rights of the respective parties—first as to whether the defendants are overstepping the powers which the law gives to them, and, secondly, whether the plaintiffs are in such a situation that they are entitled to equitable relief. Where such a doubt exists the arm of the Court will not be stretched out to aid the plaintiffs and to give to them dur-

ing the pendency of this action all of the relief which they sought and may obtain by a final judgment. Motion is denied with $10 costs."

Defendants respectfully ask special attention to that portion of Mr. Justice Lydon's opinion wherein he says:

"To sum up the claims of the parties, the plaintiffs contend that *if they do not get this injunction pendente lite* [fol. 61] *their business is liable to come to a standstill* as they will be unable to employ labor."

and to the obvious inconsistency between the gloomy predictions thus made under oath by all the plaintiffs in the Post & McCord action (including the plaintiffs in the instant action) as far back as June, 1924 and the allegations of the complaint in the instant action showing that the four plaintiffs herein (by no means the largest of the Iron League members) are now engaged upon the execution of contracts in the City of New York, aggregating Eight Million ($8,000,000) dollars (see comp. pars.) although the injunction pendente lite which they swore they must have to save their business from ruin was definitely denied them by the New York Supreme Court.

For a fifth and separate defense:

31. On information and belief allege that the matter in controversy herein does not exceed, exclusive of interest and costs, the sum of value of Three thousand ($3,000.00) dollars. That the possible ultimate facts as to the character and extent of the damages to plaintiffs from the acts of defendants alleged herein nowhere appears in the complaint in the action and that plaintiffs have failed or refused to allege in their demand for relief or elsewhere in said complaint the amount of money damages sought by them or, indeed, to demand any money damages whatever, and that the formal allegation of the sum or value thereof contained in paragraph 6 of the complaint is alleged therein only for the improper purpose of invoking the jurisdiction [fol. 62] of the United States District Court in the hope of securing thereby injunctive relief already denied to plaintiffs in the action already pending between plaintiffs and other employers, as plaintiffs, and virtually the same defendants in the New York Supreme Court.

For a sixth and separate defense:

32. On information and belief that the loss and damage to the property of plaintiffs from the acts of defendants alleged in the complaint in this action will not be irreparable as alleged in paragraph 21 of said complaint, as it nowhere appears in said complaint that the injuries therein complained of are "of such constant and frequent recurrence that no fair or reasonable redress can be had therefor in a Court of Law," and that, on the contrary, the only instances of alleged injury (which are hereby denied) are isolated and not of such character as properly to warrant the injunctive relief, which, alone, is demanded in the complaint—no money damages being demanded.

For a seventh, separate and distinct defense and by way of objection to the jurisdiction of this Court:

33. Defendant, Arthur Bolton, denies, and on information and belief, all the other defendants deny that this is an action "between citizens of different states" as provided by Judiciary Code, Section 24, in that whereas three of the plaintiffs are alleged in the complaint herein to be corporations organized and existing under the laws of the State of New Jersey, and all the defendants to be citizens, inhabi-[fol. 63] tants and residents of the State of New York, said defendant Arthur Bolton is and ever since this action was instituted has been a citizen, inhabitant and resident of the State of New Jersey.

For a separate and distinct defense and by way of counterclaim as part of and arising out of the transactions set forth in the complaint and out of which the plaintiffs' alleged cause of action is alleged to arise, defendants allege as follows:

(34) On information and belief, the National Steel Fabricators' Association, the Bridge Builders' and Structural Society, the Structural Steel Society and the American Erectors' Association are national associations whose members are manufacturers, fabricators and erectors of structural steel and iron throughout the United States.

(35) On information and belief the National Erectors' Association, an organization of corporations, firms and individuals engaged in the manufacture, fabrication and erec-

tion of steel and iron throughout the United States, has its office in the City of New York, and has district offices in Pittsburgh, Cleveland, Kansas City, Milwaukee and Philadelphia; the membership of the said Association includes the American Bridge Company which is a subsidiary of the United States Steel Corporation, owned and directed by the latter, and includes other large steel companies directly and through their subsidiaries controlling a practical monopoly of the structural steel manufactured in the United States.

[fol. 64] (36) On information and belief the United States Steel Corporation is a great steel corporation with assets of considerably over one billion dollars, transacting directly and through its subsidiaries, about 45% of the business in the City of New York and steel mills throughout the United States. It is by far the largest and most important of all factors in the steel business in the United States. Its said subsidiary American Bridge Company is by far the most important, in the United States, of the manufacturers of structural steel used in the construction of buildings. The next largest is the Bethlehem Steel Corporation.

(37) On information and belief, organizations associated with the above national associations were formed in New York City and other large centres of population. The local organization in New York City was known until July, 1920, at which time it dissolved in the manner and for the purposes hereinafter set forth, as the Iron League Erectors' Association, of which all the plaintiffs herein were members. The said Iron League Erectors' Association was transformed in July, 1920, into the Iron League of New York, of which the plaintiffs are members.

(38) On information and belief, the affairs of the National Erectors' Association, and of the Iron League are directed for and on behalf of such associations in the main by one Walter Drew, sometimes known as Attorney, and sometimes as Commissioner for both of the last named organizations and the members thereof including the plaintiffs.

(39) On information and belief, the plaintiffs, commencing about the year 1906 and continuing down to the present [fol. 65] date have continuously conspired and combined with each other and with the said National Steel Fabrica-

tors' Association, Bridge Builders and Structural Society, Structural Steel Society, American Erectors' Association, Iron League of New York and with the respective members of such associations, the United States Steel Corporation, the Bethlehem Steel Corporation, and other manufacturers of steel in various sections of the United States, together constituting over 80% in value and amount of the entire output of structural steel, to destroy the defendant International Association of Bridge, Structural and Ornamental Iron Workers, (which for the purpose of brevity, will be hereafter referred to as the Iron Workers' Union), and to destroy the associated local organizations of workmen engaged in the erection of structural steel and iron in the City of New York and elsewhere, and to destroy the business of the firms and corporations which did and now do employ members of the Iron Workers' Union and other organizations of union labor, under agreements recognizing such unions and to prevent the unionization of the manufacture fabrication and erection of steel and iron throughout the United States in the manner and by the unlawful means herein set forth.

(40) On information and belief, to carry out the purposes of the said combination and conspiracy and in order to effect the objects thereof, the plaintiffs directed their efforts along two main channels, (a) the destruction or impairment by unfair competition of the business of corporations, firms or persons employing members of the Iron Workers' Union under agreements recognizing said union, [fol. 66] and, (b) the destruction of the Iron Workers' Union itself.

(41) On information and belief, to carry out the purposes of the said combination and conspiracy and in order to effect the objects thereof, the plaintiffs, as members of the Iron League Erectors' Association, became, in about the year 1906, members of an organization known as the Building Trades Employers' Association and continued to be members of such an association until June, 1920.

(42) On information and belief, the Building Trades Employers' Association was, and is, composed of members of constituent associations of employers in the various industries connected with the building trades in the City of New York and vicinity and includes also individual and firm

members; that on information and belief, the total invested capital represented by its membership runs into millions of dollars; that, on information and belief, this organization is managed by a Board of Governors, and has a Constitution and By-Laws that are enforced by its members under compulsion of fines and penalties.

(43) That, on information and belief, members of the Building Trade Employers' Association, with the exception of the Iron League Erectors' Association, and the plaintiffs herein, employed union labor; that upwards of sixty labor unions connected in one way or another with the building trades, with a total membership of upwards of 115,000 men, constituted an organization known as the Building Trades Council, which, during all or a substantial part of the time [fol. 67] that the plaintiffs were members of the Building Trades Employers' Association, operated in conjunction with the said Building Trades Employers' Association; that, on information and belief, the said Building Trades Council was so organized that by the express terms of its constitution the appointment of all the officers and members of the Executive Committee was lodged in its President, Robert P. Brindell.

(44) That on information and belief, by a scheme of operation between the Board of Governors of the Building Trades Association and the said Robert P. Brindell as head of the Building Trades Council, the building industry of the City of New York and the awarding of contracts and subcontracts in that industry were controlled and manipulated so as to prevent non-members of the Building Trades Employers' Association from obtaining contracts and so as to promote price fixing and other illegal practices on the part of the employers and extortion on the part of Brindell by arrangement between them and that such price fixing and other illegal practices were carried out by said employers and extortion was practiced by said Brindell.

(45) That, on information and belief, the members of the Iron League Erectors' Association, and the present plaintiffs, participated in these pernicious activities by their membership in the Building Trades Employers' Association, and that they utilized the situation so created as a means by which to carry out the purposes of the said combination and conspiracy and to effect the objects thereof.

(46) That, on information and belief, to carry out the purposes of the said combination and conspiracy and in [fol. 68] order to effect the objects thereof through the use of the Building Trades Employers' Association, the Plaintiffs also compelled the members of the Building Trades Employers' Association to award their contracts for the erection of steel and iron to the members of the Iron League Erectors' Association and the present plaintiffs who did not recognize the Iron Workers' Union. By this means independent steel erectors who recognized the Iron Workers Union were prevented from obtaining contracts. On the other hand, if they did obtain contracts they could be, and on information and belief, were harrassed by the activities of Robert P. Brindell. In this way, by a skillful use of the Building Trades Employers' Association and its offending members, the Iron League Erectors' Association was able to control and manipulate the awarding of contracts in their industry, thereby destroying the businesses of independent erectors who chose to recognize the Iron Workers Union.

(47) On or about December 17, 1919, the Building Trades Employers' Association, by an agreement with the Building Trades Council recognized Local No. 40 of the Iron Workers' Union.

(48) On information and belief the members of the Iron League Erectors' Association and the present plaintiffs were bound by such agreement.

(49) On information and belief, to carry out the purposes of the said cambination and conspiracy and in order to effect the objects thereof, the present plaintiffs and the members of the Iron League Erectors' Association resigned from the Iron League Erectors' Association in order to terminate their membership in the Building Trades Employers' Association and thereby repudiated the agreement. [fol. 69] Almost immediately thereafter, the Iron League of New York was formed and the present plaintiffs became members in the substitution for the Iron League Erectors' Association and in order to carry out the aims and objects of the conspiracy to destroy the Iron Workers' Union independently of the Building Trades Employers' Association, now that the latter could no longer be used to further

the aims and objects of that conspiracy in that it had recognized and contracted with the Iron Workers' Union.

(50) On information and belief, to carry out the purposes of the said combination and conspiracy and in order to effect the objects thereof and to destroy the enterprises of independent erecting contractors who recognized the Iron Workers' Union, the members of the combination and conspiracy, including the present plaintiffs, refused to sell steel and iron to such independent contractors if the steel was to be erected under union conditions and by union labor.

(51) On information and belief, to carry out the purposes of the said combination and conspiracy and in order to effect the objects thereof and to destroy the enerprises of independent erecting contractors who recognized the Iron Workers' Union, the members of the combination and conspiracy including the present plaintiffs refused to sell steel and iron f. o. b. New York City to such independent erecting contractors and insisted on selling it erected in place by non-union labor which they themselves supplied.

(52) On information and belief, to carry out the purposes of the said combination and conspiracy and in order to [fol. 70] effect the objects thereof the members of said combination and conspiracy, including the plaintiffs, submitted and submit and insisted upon and insist upon prices for steel and iron f. o. b. in New York City to independent erecting contractors engaged in erecting buildings in the City of New York, who recognized the Iron Workers' Union which were and are grossly excessive and created and create differentials against such independent erecting contractor and in favor of the plaintiffs and other members of the combination and conspiracy with the result that an independent contractor who recognized the Iron Workers' Union had to and has to pay vastly more for steel and iron f. o. b. in New York City than a contractor who refused and refuses to recognize the said union and thereby hampered the construction of buildings in the City of New York and rendered it impossible for independent contractors who recognized the Iron Workers' Union to compete with the plaintiffs and thus secured for the plaintiffs an unlawful advan-

tage over the independent contractors who employed members of the Iron Workers' Union.

(53) That, on information and belief, to carry out the purposes of the said combination and conspiracy and in order to effect the objects thereof, the members of the said combination and conspiracy, when they did take orders from independent contractors recognizing the Iron Workers' Union, controlled the deliveries to those contractors as to time, and so used such control as to delay shipments that were required and otherwise hampered such independent contractors in their building operations with the intent to prevent and discourage their recognition of the Iron Workers' Union, so that a great length of time was allowed to elapse before the delivery was made and the [fol. 71] order fulfilled, causing great financial loss and inconvenience to the independent contractors and to the Iron Workers' Union and its members who were thereby deprived of employment.

(54) That on information and belief, these practices of refusing to sell steel and iron to independent contractors who recognized the union and of refusing to sell steel and iron f. o. b. New York City to independent contractors who recognized the union and refusing to sell steel and iron f. o. b. except at a price discriminatory against the independent contractors and of controlling deliveries of steel and iron to independent contractors so as to delay the progress of their work, actually did destroy the erecting contracting business of such firms as Thompson Starrett Company, the George A. Fuller Company and other independent erecting contractors in the City of New York who recognized and employed the members of the Iron Workers' Union with the result that many sources of employment were closed to the members of the Iron Workers' Union thereby.

(55) That, on information and belief, the combination and conspiracy was particularly effective against firms and corporations employing union labor, for the reason that those firms, through the operation of the conspiracy, could not and cannot freely secure steel for erection purposes unless they agree to operate with non-union labor in the erection of steel and iron; if they did so agree they could

not and cannot secure competent workmen as all available competent non-union men have been absorbed by the members of the combination and conspiracy.

(56) That on information and belief, to carry out the purposes of the said combination and conspiracy and in [fol. 72] order to effect the objects thereof, statements of policy against unionism and the affirmation of the principle of maintaining the non-union shop throughout the steel industry, have been repeatedly made in meetings of the National Erectors' Association, in meetings of the Iron League Erectors' Association, in conference with officers and officials of the large steel companies, in letters and correspondence among and between officials of these companies and members of the various associations comprising the conspiracy, and in pronouncements written and oral to independent contractors in the business of erecting steel; that the main purposes and intent of these statements, communications, announcements, et cetera, were to create propaganda in favor of the non-union policy and to cause the destruction of the Iron Workers' Union.

(57) That to carry out the purposes of the said combination and conspiracy and in order to effect the objects thereof, statements of policy against unionism and the affirmation of the principle of maintaining the non-union shop throughout the steel industry have been repeatedly made to iron workers and their helpers, whether members of the Iron Workers Union or not, in literature which was placed in their pay envelopes. This literature contained untrue, improper and inflammable statements intended and directed to destroy and which did destroy the power and influence of the Iron Workers' Union.

(58) That, on information and belief, to carry out the purposes of the said combination and conspiracy and in order to effect the objects thereof, the Iron League Erectors' Association passed a resolution to the effect that all of its members should employ a substantial percentage [fol. 73] of non-union members on all new erection work after December, 1919, which resolution was carefully followed and resulted in the discharge of and refusal of employment to many members of the Iron Workers' Union.

(59) That, on information and belief, to carry out the purposes of the said combination and conspiracy and in order to effect the objects thereof, for many years past and continuing down to the present time, the National Erectors' Association, the Iron League Erectors' Association, the Iron League and the present plaintiffs employed and supported a large number of detectives, investigators and agents provocateur under the direction of one Robert Foster who maintained his headquarters at the office of the National Erectors' Association and who was and is subject to the orders of and worked and works in conjunction with the said Walter Drew on behalf of the National Erectors' Association, the Iron League Erectors' Association and the Iron League.

(60) That to carry out the purposes of the said combination and conspiracy and in order to effect the objects thereof, the National Erectors' Association, the Iron Erectors' Association, the Iron League and the present plaintiffs caused said Foster and his operatives to maintain and run a department known as a Labor Bureau. That this Labor Bureau, on information and belief, was used by the plaintiffs as and was an effective means of black-listing the members of the Iron Workers' Union, of preventing their employment and of securing their discharge. That on information and belief, this Labor Bureau was and is supported by contributions from the members of the National Erectors' Association, the Iron League Erectors' Associa-[fol. 74] tion, the Iron League, and the plaintiffs, based on assessments made on a tonnage basis.

(61) That, on information and belief, to carry out the purposes of the said combination and conspiracy and in order to effect the objects thereof, in times of industrial depression in the steel industry the said Foster and his operatives spent their time and energy in creating propaganda against the Iron Workers' Union, in dissuading workmen from joining it and persuading workmen to resign from it. That this large detective force constituted a spying system of paid propagandists which had and has for its avowed purpose, keeping the structural iron workers from organizing and destroying the vitality of any organization including the Iron Workers' Union which at-

tempts to secure for structural iron workers the benefit of union agreements. That these propagandists and spies became members of the Iron Workers' Union and frequently worked their way up to and occupied high positions of trust therein.

(62) That, on information and belief, to carry out the purposes of the said combination and conspiracy and in order to effect the objects thereof, in times of industrial strife and strikes it was and is the purpose of the said Foster and his operatives and paid propagandists to, and they did and do, act as spies at the meetings of the Iron Workers' Union and generally during the course of their activities; it was and is their purpose to, and they did and do, create unfavorable propaganda against the Iron Workers' Union; it was and is their purpose to, and they did and do, transport strike-breakers from one part of the country to another; it was and is their purpose to, and they did and [fol. 75] do, recruit strike-breakers, and it was and is their purpose to create dis-harmony and dissension which are intended to lead to acts of violence; it was and is their purpose to and they did and do, as spies and alleged members of the Iron Workers' Union, commit such acts of violence, and then attempt to lay these acts of violence at the door of the Iron Workers' Union in accordance with the immemorial custom of agents provocateur.

(63) That, on information and belief, many members of the Iron Workers' Union have been discharged and many members have been refused employment time and again as a result of the combination and conspiracy of this propaganda against unionism and of the work of Foster and his operatives pursuant to the combination and conspiracy, as aforesaid.

(64) That, on information and belief, many iron workers and their helpers have been prevented and dissuaded from joining the Iron Workers' Union and many members thereof have resigned therefrom by reason, and as a result, of this propaganda against unionism and the work of Foster and his operatives, pursuant to the combination and conspiracy, as aforesaid.

(65) That said combination and conspiracy constitute a monopoly as regards the erection of steel buildings, and is

thus and otherwise violative of the law in that it constitutes a restraint of interstate trade and commerce.

(66) That, on information and belief, the said combination and conspiracy also violate the Federal Trade Commission Act, in that unfair methods are employed in an [fol. 76] attempt to secure a monopoly to the members of the combination of the building industry in the City of New York and elsewhere.

(67) That, by reason of the activities of the said combination and conspiracy there have been arbitrary and illegal interferences with the legitimate organization activities of the Iron Workers' Union, industrial strife has been greatly promoted to the detriment and damage of the Iron Workers' Union, the number of corporations, firms, and individuals engaged in the building industry in the City of New York and elsewhere who recognize the Iron Workers' Union has been and is artificially and arbitrarily limited and long, unnecessary and arbitrary delays have been created in the erection of buildings in New York City and elsewhere, all to the detriment and damage of the Iron Workers' Union.

(68) That by reason of said combination and conspiracy and by reason of the illegal acts and practices of the plaintiffs as members of such combination and conspiracy, the defendants herein and the good will, activities, numerical strength and material resources of the Iron Workers' Union have been greatly injured to their damage and to the damage of the Iron Workers' Union, besides suffering other damages for which there is no remedy at law.

(69) This suit is of a civil nature in equity and the matter in controversy exceeds, exclusive of interest and costs, the sum of Three thousand ($3,000.00) Dollars.

Wherefore defendants pray judgment:

1. That the plaintiffs in this suit, Levering & Garrigues Company, Hay Foundry & Iron Works, Hedden Iron Con- [fol. 77] struction Company, McClintic-Marshall Company, and each and every of them and all persons associated with them and their agents, servants, attorneys, confederates, and any and all persons acting in aid of or working on combination with them, be enjoined and restrained as follows:

(a) From conspiring and combining to destroy the existence of the defendant Union, the International Association of Bridge, Structural and Ornamental Iron Workers;

(b) From discriminating in terms, prices, or discounts, charged for structural steel and iron, or for the erection thereof in place, against any person, firm or corporation by reason of the fact that the said person, firm or corporation employs a member or members of the defendant Union, or operates a closed Union shop principally by agreement with the said union;

(c) From discriminating in the time of delivering of structural steel or iron to purchasers of the same by reason of the fact that such purchasers employ a member or members of the defendant Union, or operate a closed shop principally by agreement with the said union.

(d) From refusing to sell structural steel and iron to any person, firm or corporation by reason of the fact that such person, firm or corporation employs a member or members of the defendant Union, or operates a closed shop principally by agreement with the said union;

(e) From boycotting or attempting to boycott, or inducing others to boycott any person, firm or corporation by reason of the fact that such person, firm or corporation *by reason of the fact that such person, firm or corporation* [fol. 78] employs a member or members of the defendant Union, or operates a closed shop principally by agreement with said Union;

(f) From in any wise coercing or inducing any firm, person or corporation to refuse to employ members of the defendant Union, from doing any act or thing whatsoever to restrict defendants or members of the defendant Union from the free and unhindered control and conduct of the defendants' business and of the Iron Workers' Union, and from causing any firm, person or corporation willing to employ members of the said Union to refrain from doing so by propaganda, communications, statements or conduct;

(g) From interfering with, hindering or obstructing the defendants' business and the operation of the defendant Union in any manner by inducing, compelling or attempting to induce or compel by threats or otherwise, any person,

firm or corporation employing any member of the defendant Union, to discharge the said member or said members, or to refuse or fail to perform their duties as such employers;

(h) From unlawfully inducing, persuading or causing or attempting to induce, persuade or cause the employers of any member or members of the defendant Union to break their contracts of employment with such member or members.

(i) From doing any act or thing whatsoever to cause dissension and foment disturbance and trouble in the ranks of the defendant Union by the use of propaganda, threats, communication, language, conduct or otherwise;

(j) From unlawfully inducing, persuading, or causing, or attempting to induce, persuade or cause any member or [fol. 79] members of the defendant Union to resign from said Union by use of propaganda, threats, communication, language, conduct or otherwise;

(k) From unlawfully inducing, persuading or causing or attempting to induce, persuade or cause any person eligible to become a member of defendant Union, from joining such Union;

(l) From advising with, encouraging, persuading or consulting with employers of a member or members of the defendant Union, with the design of procuring agreements on the part of such employer by which he or it agrees to employ only non-union labor, or by which he agrees not to employ members of the defendant Union.

2. That the said combination and conspiracy on the part of the plaintiffs, and all activities in pursuance thereof shall be declared to be illegal.

3. That the defendants have $10,000,000.00 damages.

4. That the defendants may have such order, judgment or decree or other relief in the premises as to the Court may seem proper.

Frank P. Walsh, Attorney for Defendants. Office & Post Office address: 55 Liberty Street, Borough of Manhattan, City of New York.

[fol. 80] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLY TO COUNTERCLAIM

Reply to counterclaim of all defendants except Arthur Bolton, the said Arthur Bolton not being a defendant in this cause.

1. Deny the statements contained in paragraph 34 except the allegations relating to the American Erectors' Association as to which plaintiffs deny any knowledge or information thereof sufficient to form a belief.

2. Deny each and every allegation contained in that part of paragraph 35 reading as follows: "the membership of the said Association includes the American Bridge Company which is a subsidiary of the United States Steel Corporation, owned and directed by the latter and includes other large steel companies directly and through their subsidiaries controlling a practical monopoly of the structural steel manufactured in the United States," except that plain-[fol. 81] tiffs admit that the American Bridge Company is a member of the National Erectors' Association.

3. Deny each and every allegation contained in said counterclaim in each of the paragraphs numbered 38, 39, 40, 41, 45, 46, 48, 49, 50, 51, 52, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68 and 69.

4. Deny any knowledge or information thereof sufficient to form a belief, as to each of the allegations contained in paragraphs 36, 43 and 44.

5. Deny the allegations in the first sentence of paragraph 37 as to plaintiffs and deny any knowledge or information thereof sufficient to form a belief in so far as the allegations in said first sentence refer to other alleged national associations; and plaintiffs deny each and every allegation contained in the second sentence of paragraph 37, except that the Iron League Erectors' Association was dissolved in 1920 and that the Iron League was organized in 1920.

6. Deny the allegations in paragraph 53 as to the plaintiffs and deny any knowledge or information thereof suf-

ficient to form a belief in so far as the allegations in said paragraph refer to other persons.

And for a first separate and distinct defense to the alleged cause of action set forth in the counterclaim in said amended answer, plaintiffs allege:

7. Plaintiffs repeat each and every of the allegations contained in the bill of complaint and say that by reason of the [fol. 82] facts therein alleged the said defendants are barred from prosecuting or seeking any relief by reason of the matters and things set forth in the counterclaim.

And for a second separate and distinct defense set forth in the counterclaim plaintiffs allege:

8. Defendants have made no timely and diligent effort by any action or proceeding based upon the alleged acts and transactions set forth in the counterclaim; and defendants have been guilty of such lack of diligence and are now guilty of such laches in the premises that they may not now question or complain of the aforesaid acts and transactions alleged in said counterclaim and consequently defendants are not at this late day entitled to any assistance or relief from a court of equity.

Defense in Matter of Law

9. Plaintiffs say, and they pray the same benefit of this defense as if it had been made by way of plea or motion to strike out the bill, that the matters and things set forth in the said counterclaim are not sufficient to constitute a cause of action cognizable in equity; that the matters and things set forth in the said counterclaim are not matters and things growing out of the transaction mentioned in the bill of complaint and are not germane to the bill of complaint or to the relief therein prayed and have no regard to the subject matter of the bill of complaint and are not the proper subject matter of a counterclaim or cross bill; that this court lacks jurisdiction; that there is no interest disclosed by the coun- [fol. 83] terclaim in the defendants to obtain the relief prayed for in the counterclaim; that this court is without jurisdiction to grant the relief prayed for in the counterclaim and specifically with respect to the claim for damages that this court has no jurisdiction in this suit to award damages at the suit of the defendants and that to so do

would be to deprive the plaintiffs of the rights secured to them by the Constitution of the United States, to a trial by jury, the claim for damages being purely an action at law.

Edward Maxson, Attorney for Plaintiffs. Office and P. O. address: 165 Broadway, Borough of Manhattan, City of New York.

[fol. 84] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OF REFERENCE—NOV. 13, 1925

[fols. 85-1965] On reading and filing the annexed Consent of the attorneys for the plaintiffs and defendants above named, it is hereby

Ordered, that this cause and all the issues therein are hereby referred to Wm. M. Cannon, Esq., of as Referee, to hear and determine; and it is further

Ordered, that in order to preserve the status quo of the parties and without prejudice to either party, the temporary restraining order heretofore granted herein, ex parte, be and is hereby continued until the further order of this Court.

Wm. Bondy, U. S. D. J.

The entry of the above order is hereby consented to.

Edward Maxson, Attorney for Plaintiffs. Nathaniel Cohen, Attorney for Defendants Edward Coleman, Indiv. and as Pres., etc., International Assn., etc., John Snyder, and Henry G. Wolf. Frank P. Walsh, Attorney for Defendants.

[fol. 1966] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPORT AND DECISION OF REFEREE

Pursuant to an order made on November 23, 1925, on stipulation of all the parties, appointing me referee to hear and determine all the issues herein, this cause came on regularly for trial on the 4th day of January, 1926, Edward

Maxson, Esq. and Merritt Jane, Esq. appearing as counsel for plaintiffs, Nathaniel Cohen, Esq. appearing for the defendants, Henry Wolf, Edward Coleman and Local No. 52 of the International Association of Bridge, Structural and Ornamental Iron Workers, and Frank P. Walsh, Esq., Edward K. Sumerwell, Esq. and Harold Stern, Esq. appearing for all of the other defendants.

Hearings were had from time to time until May, 1929, in which over 1,900 pages of testimony were taken and over 170 exhibits admitted. After the evidence was concluded, briefs covering more than 900 printed pages were filed, and the cause was later orally argued and finally submitted for decision on May 23, 1929.

[fol. 1967] The action was brought to obtain a permanent injunction against defendants restraining and enjoining them from combining and conspiring for the purpose of injuring or destroying plaintiffs' business, and from continuing a course of action which, it is alleged is causing and will continue to cause plaintiffs irreparable injury. Relief is asked both under the common law and the Sherman Act as amended by the Clayton Act, October 15, 1914 (38 Stat. at L. 730, 737, Chap. 323).

The four plaintiffs are foreign corporations engaged in the fabrication of structural iron and steel in states other than New York and in the erection thereof in the Metropolitan District of New York, a territory comprising the area within a radius of twenty-five miles from the City Hall in New York City. Plaintiffs are also engaged in the erection of iron and steel in other states. They are members of an association called the "Iron League," composed of at least fourteen corporations engaged in the same character of work. Plaintiffs' work is ordinarily done under subcontracts for the erection of iron and steel obtained from general contractors having contracts for the construction of entire buildings or other structures. In some instances plaintiffs' sub-contracts include fabrication as well as erection. The volume of business done by plaintiffs in the metropolitan district is very large, their contracts for the year 1925, when this suit was brought, amounting to many millions of dollars.

The defendants are Paul J. Morrin, individually and as president of the International Association of Bridge, Structural and Ornamental Iron Workers, herein called the "In-

ternational," and its Local Unions numbered 40, 361, 52, 197 and 170. The individual defendants are officers, busi-
[fol. 1968] ness agents and other representatives of the local unions. The action has been dismissed as to the defendants Arthur Bolton, David Baxter, Patrick Farrell, Charles MacDonald and District Council of New York and Vicinity.

The International is a voluntary labor organization, consisting of local unions and the members thereof, including bridge, structural, ornamental and reinforced concrete iron workers, shop men, riggers, machinery movers, stone, derrick men and pile drivers (Constitution, Def. Exhibit A, Art. I, II).

Its objects, as set forth in its constitution, are, among other things, to secure by legal and proper means pay commensurate with the hazard, physical and mental taxation, exhaustion and average life endured by its members in performing services of the trade, and to promote sale and reasonable methods of work (Constitution, Def. Ex. A, Art. III).

It claims for its members jurisdiction over all branches, trades and crafts of the building industry, in shop and outside, throughout the United States and Canada, comprising the fabrication, erection and construction of all iron and steel, ornamental lead, bronze, brass, copper and aluminum, reinforced concrete structures and a large number of other classes of metal work connected with the building industry, including the operation of derricks and cranes on all forms of construction work, the moving, hoisting and lowering of machinery, and practically all other work incidental to the actual construction of buildings and other structures (Constitution, Def. Ex. A, Art. IV).

It functions through a general executive board consisting of the general president, the general secretary-treasurer [fol. 1969] and one out of nine general vice-presidents. This board, among other things, is authorized to enter into all agreements which in its judgment may be to the best interest of the membership. It has full supervision over all strikes and exercises authority over them. On all matters not otherwise specifically provided for this board has full power to act (Constitution, Def. Ex. A, Art. XII, Sec. 3).

The duties and powers of the general president are to exercise a general supervision over the affairs of the association, its officers and organizers, and to assign them to their respective duties; to appoint all officers and committees, organize or cause to be organized local unions, decide all points of law, and suspend any subordinate body for violation of the constitution and laws; to order subordinate bodies to disband under penalty of revocation of charter whenever in his judgment they are working against the best interests of the association; to take possession of and examine all books, papers and financial accounts of subordinate bodies; to suspend officers of the association or any of its chartered bodies for being derelict in their duties or for failure to promptly comply with his instructions with the approval of the general executive board, to effect a settlement of any strike; and to assign to any of the general vice-presidents any particular duty to assist him regardless of their respective order or title (Constitution, Def. Ex. A, Art. IX).

The members of the International, consisting of local unions composed of practical workmen eligible for membership and operating under a charter granted by the association, have very limited powers. They are forbidden to [fol. 1970] call certain strikes or to cause the stoppage of any work without first securing the sanction and approval of the general president. Each local has a business agent who is the recognized representative of the union to the employers and general public (Constitution, Def. Ex. A, Art. XVIII, Secs. 1-22).

At the time of the commencement of this action the International had a membership of approximately 30,000 men. Its membership in the Metropolitan District of New York alone was about 8,000.

The defendant Morrin, who was the general president at all times involved herein, had in conjunction with the executive board, of which he was a member, practically complete power and authority over the local unions which, especially in matters connected with strikes, were entirely subject to his dictation and control; and he, in connection with the other members of the general executive board, all of whom were in harmony with his policies, was in position to exercise the full power and authority of the International.

At the time of the occurrences involved herein, the building industry in the Metropolitan District of New York was completely organized, excepting as to the plaintiffs and other members of the iron league (S. M., 334). Employers engaged on sub-contracts covering all other crafts in the industry had recognized the unions and were operating under union conditions, including the closed shop. The plaintiffs and other members of the iron league were operating on the open shop basis, the effect of this being that in the construction of large buildings members of unions operating closed shop and working on the same building at trades other than steel erection work, would have to work side [fol. 1971] by side with such non-union men as might be employed by members of the league. These concerns, although operating open shop, employed both union and non-union men. In other words, they were not operating on what is known as a non-union closed shop basis, but employed union as well as non-union men, without, however, recognizing the union or submitting to union conditions.

There has been almost continuous strife between the iron league and the International for over twenty years. Since 1905 the league has consistently and persistently operated on the open shop plan, employing both union and non-union labor. The International's uniform policy has been to cause the league to recognize the union and work under union conditions, including the closed shop. The result has been strikes and other labor troubles occurring from time to time during the intervening years, some of them accompanied by sympathetic strikes. The latest strike began on May 1, 1924.

In July, 1924, while this strike was in progress, the International and its executive officials evolved a new and unique plan to bring about the submission of the league. This was well conceived and put into effect with the vigor characteristic of the International's officials. What it was clearly appears from the circular letter issued by the International in July, 1924 (Exhibit P-26; S. M., 364), and excerpts from issues of The Bridgemen's Magazine, the official journal of the International, published in and after August, 1924. How the plan was prosecuted and effectuated is also shown by these excerpts and by the testimony of many witnesses.

[fol. 1972] In the Bridgemen's Magazine for September, 1924, appears the following:

"I arranged almost two months ago for the daily Dodge work reports to be sent to our New York International office for the information of our various local unions and their business agents and the International representatives who were assisting in the New York strike. These reports give detailed information from the time that any job is contemplated, giving the owner and architects of the proposed work, the nature of the building as well as the nature of its construction and the contemplated time of beginning such job. This information is of immense value and through the highly systemized efforts of the Dodge Company who get out these reports they are able to give very accurate, first class information just as any building work or job is contemplated. Our International representatives segregate these reports when they are received at our International office in New York and the information conveyed to our our various representatives and business agents. Letters are immediately sent out by our International office to the owners and architects, informing them of our present strike situation in the New York district and urging them to favorably consider having their steel erecting work done under union conditions and by union men, and pointing out to such owners and architects the advantage of following this course and requesting that they favor some union contractor or have the steel erected under fair conditions either through themselves, architect, owner, or the general contractor.

"When bids are being taken on such contemplated work the Dodge reports show this information and immediately our International representatives call on the various general contractors to whom this work has been awarded, urging that they also consider union firms for the erection of [fol. 1973] their steel and iron work. This is followed out by the International men in connection with the jobs of medium or large size and the same procedure is followed out by the International representatives who accompany the local business agents on the work of a smaller nature. This system entails a great deal of work through writing letters just as soon as the jobs come out and by having the same followed up by personal calls as outlined to the architect

and owner and by being later followed up by personal calls to the general contractor, but the results obtained by carrying out this plan have been very good. If we meet with the success which we anticipate in this direction it will not be many months before the members of The Iron League will feel to a considerable extent such influence and I feel that by following intelligent efforts of this kind that the fair contractors will be able to secure a large amount of this work. As the members of The Iron League firms fail to connect with these contracts, which I sincerely hope they will, I think that this will have a good influence upon them and it may possibly be the means of having them work in harmony with our organization."

In the Bridgemen's Magazine for October, 1924, the following appears:

"At present in the Metropolitan district of New York, which includes considerable territory surrounding that district, we have arranged for and received the daily Dodge reports which give full detailed information regarding all contemplated work starting from the owner and architect and daily reporting on such jobs until they reach the stage where work contracts are awarded. When these reports are received, letters are sent to the architect and owner by our International representatives and are followed up by [fol. 1974] personal calls, at which time every honorable effort is made to induce them to see that the steel erection is given to some contractor or erector who will erect the work with union men or erect the work themselves under union conditions. When the general contract is awarded the same procedure is followed out, both by letter and personal calls from our International representatives."

In the same issue there appears an address by defendant Morrin delivered at the 22nd convention of the International Association of Bridge, Structural and Ornamental Iron Workers, held in New York City on September 15, 1924, in which he said:

"We have had to follow lines to first establish in this district that the iron workers were an organization that could command and should command consideration by architects and contractors when letting their work. Understand in the past the attitude has been that the architects or own-

ers or contractors did not care what happened to the iron workers' union because they did not regard it of any consequence, and they did not care whether the iron workers were run into the middle of the Hudson River or not. With every other trade they were very careful of course to see that the work went to union contractors. * * * This necessitated meeting a great many contractors, employers, architects, owners and others interested.

"At the inception of the strike the Committee had assumed the position that under no consideration would they work on a sub-contract on an Iron League job. In the past that policy had been followed but in this strike we determined that we were going to squeeze the fellow that we had to squeeze because in the first place the fellow that needed to be woke up was the owner, the architect and the fellow who had the contract to let. Those were the lines we worked on for the first three months of the strike. We [fol. 1975] would not permit it, but there were any number of instances where contractors and owners and others tried to make all kinds of arrangements to get their work turned loose, but they were not successful. We had to go out and to establish to those owners that we were in a position to command consideration and we did. In other strikes men had been permitted to work on those jobs under sub-contracts, but we felt that this would be helping our enemies and so this time we sat tight.

"However, in the later months of the strike we changed our policy. We established with those owners, architects and contractors the fact that there was a real live fighting iron workers organization in this district. * * *

"Then we set about to get in daily touch with the architects and owners by checking up all new work contemplated in this district and immediately a personal letter was sent to each owner in each district calling upon them to consider the situation, and also personal calls were made by International representatives, at which time the situation was gone over. That was a big job. The building work here is enormous—there is more in this district than ever before. * * *

"I feel very confident that within a year's time we will be able to bring pressure to bear on these fellows to induce them to consider the letting of their contracts to fair contractors and when that is done our fight will be won here.

We are in the position of an army. We have taken a certain point and we have got to leave a garrison to continue the fight."

These quotations state the plan in detail. It was conceived some time in July and the first act done in carrying it out was the sending of a circular letter to owners, architects and builders. This was dated July 24, 1924 (Exhibits P-26 and P-32, pp. 364 and 434), and reads as follows:

[fol. 1976] "GENTLEMEN: We are writing to inform you that structural iron workers in the metropolitan district have been on strike since the first day of May, 1924, for an increase in wages and recognition of the local unions in the metropolitan district.

"Practically all of the firms doing steel erection work in the metropolitan district have granted the conditions asked for by the iron workers' union at the new union rate of wages of twelve ($12) dollars per day, with the exception of the members of The Iron League of New York, about fourteen in number, who insist on using non-union men on their steel erection work.

"Having a desire to cooperate with the owner, architect and contractor in every way possible in order to minimize delays in the progress of the building industry, thereby preventing useless financial losses, we are writing you this letter giving you the above information with the hope that you will cooperate with us by awarding your steel erection work to a firm that employs members of the International Association of Bridge, Structural and Ornamental Iron Workers.

"The members of the Bridge, Structural and Ornamental Iron Workers' union work for any employer who conducts his erection work under union conditions and pays union wages, whether he be owner, architect, general contractor, sub-contractor, builder or steel erector. Further information will be gladly given at this office to any one desiring same, trusting you will give this matter due consideration, we remain,

"Very truly yours, International Association of Bridge, Structural and Ornamental Iron Workers. W. J. McCain, Vice-President. D. J. O'Shea, Vice-President."

[fol. 1977] Similar circulars were sent out from time to time, as the Dodge reports showed that new contracts were to be let, and these were followed up by personal calls of the representatives of the International on owners, architects and general contractors to induce them to let their sub-contracts to "fair" contractors, that is, to contractors operating under union conditions.

On or about November 13, 1924, one of these circulars was sent to a general contractor and with it a letter from W. J. McCain, Vice-President, enclosing a list containing the names of eleven firms. This list bore the heading: "Pending the printing of a larger list of firms who use union structural iron workers on their steel erection work, the following firms are submitted to you." At the bottom of this list appears the following note:

"Any further information regarding firms using union iron workers can be had by calling Room 718, Aberdeen Hotel, Phone Penn 1600."

The letter from McCain is on the letterhead of the International and reads:

"November 13, 1924.

"GENTLEMEN: I have been informed that you are bidding on Public School 72 at N. S. Dewey Avenue, between Logan and Edison Avenues. I am writing to inform you that the structural iron workers in the metropolitan district have been on strike since the 1st day of May, 1924, for an increase in wages and recognition of their local unions in the metropolitan district.

"A very large number of firms doing steel erecting work [fol. 1978] have granted the conditions asked for by the iron workers, with the exception of the members of The Iron League of New York, some fourteen in number, and the firms connected with The Iron League insist on using non-union men on their steel erection work.

"Having a desire to cooperate with the owner, architect and contractor in every way possible in order to minimize delays in the progress of the building industry, thereby preventing useless financial losses, we are writing you this letter giving you the above information with the hope that you will cooperate with us by awarding your steel erection

work to a firm that employs members of the International Association of Bridge, Structural and Ornamental Iron Workers.

"The members of our organization work for any employer who works under union conditions and pays union wages, whether he be owner, architect, general contractor, sub-contractor, builder or steel erector.

"Trusting that you will give this matter due consideration, I remain,

"Very truly yours, W. J. McCain, Vice-President."

Beginning in September, 1924, and continuing even while the trial was in progress, minor difficulties occurred. In September a sub-contract for the erection of structural iron and steel was let to a so-called "fair" contractor at a higher figure than the bid of a member of the Iron League. The representatives of the International were to some extent active in this transaction and in fact solicited the letting of the contract to a "fair" contractor. There is evidence tending to prove that the contract was let at a higher figure because of the apprehension of the general [fol. 1979] contractor that there might be labor troubles on the building if the contract were awarded to a member of the league (S. M., pp. 318-328).

At various times thereafter and as late as 1926 representatives of the International threatened to call members of their locals, then working in harmony with their employers on a closed shop basis, out on strike. In some instances men were actually called out. Threats to strike were withdrawn or the men permitted to return to work only on assurance, in some cases, that with future contracts care would be taken to comply with union conditions. In some instances the threats to strike had the effect demanded by the representatives of the International, namely, the withdrawal of the "unfair" contractor and the finishing of the work by a "fair" contractor. It is unnecessary minutely to go into the details of all these incidents. The testimony as to some of them appears in the stenographer's minutes at pages 900-903, 613-624, 1013-1024, 1442-1484, 729-1776, 516-525, 385-697, 1028. They are important only as evidence tending to show that the plan or scheme of the International above outlined was being vigorously pressed and that the activities of the representatives of the Inter-

national were having their intended effect upon owners, architects and general contractors.

In February, 1925, the defendants caused the International, through the defendant Morrin and the executive board, to call a strike of their locals No. 52, ornamental iron workers, and No. 197, stone derrick men. Local 52 had been operating for years under a closed shop agreement. This had been modified from time to time and submitted to the executive board of the International for approval, as required by its constitution. Up to the time of the strike [fol. 1980] this local had been operating under this agreement, as so modified, without any objection from the International, although it had never been formally approved or disapproved. The stone derrick men were also at peace with their employers and operating closed shop.

In the New York Times of February 9, 1925 (Plaintiff's Exhibit P-21; S. M., 1158), the day before the strikes of ornamental iron workers and stone derrick men were called, an article was published headed "1,200 Iron Workers Will Strike Today". The article purported to report interviews with the defendant Morrin and other labor officials. It stated, in substance, that ornamental iron workers, derrick men, riggers and machinery movers would strike on that day, quoting defendant Morrin to that effect; that the strike was being called on building operations where steel was being erected by non-union iron workers; that it would not affect the erection of steel but was expected to halt work on fire-escapes, elevator enclosures, iron stairways, and grill work operations conducted by ornamental iron workers; that the walkout of derrick men would stop the hoisting of stone and this in turn would slow down, if not entirely stop, the work of bricklayers; that the riggers install boilers, tanks and machinery; that the activity of the iron workers' union was directed solely against the iron league of New York, whose policy is not to recognize the iron workers' union; that the union hopes that by stopping all ornamental iron work, the erection of stairways and the installation of boilers and machinery, as well as the setting of stone, the general contractors will bring pressure to bear on the iron league to recognize the iron workers' union; that union officials said that the strike call [fol. 1981] would be answered by 1,200 iron workers, 500 derrick men and 350 riggers, all of whom are members of

local unions affiliated with the International; that the strike would be called on every job in the metropolitan area where employers affiliated with the league were handling the erection of steel; that about 25 buildings would be affected; that the strikes in three trades here were to be preliminary to a nation-wide movement that might mean the tie-up of millions of dollars worth of building operations all over the country; that the national strike order would be held in abeyance until the results of the local situation were noted; that union officials indicated that, if necessary, ornamental iron workers, riggers and derrick men employed by New York builders erecting structures in other cities would be called out; that such a move would be made because of the fact that outside of New York the general contractors erect steel under union conditions but give the work in New York to a large extent to members of the league; that complete arrangements for an aggressive campaign in all the large cities had been completed by the International union's executive board; that the board would visit all the large steel centers and endeavor to unionize those cities to prevent the National Erectors Association from sending non-union iron workers into New York to support the league.

The reporter writing this article was called and testified to its correctness, saying that in substance it correctly reported statements made to him by the defendant Morrin and other union officials (S. M., 1143-1145). Morrin was called by plaintiffs as a witness before the trial ended. He was not examined, either by plaintiffs or defendants, as [fol. 1982] to the Times article nor as to the reporter's conversation with him. Neither were other union officials called to testify either that they had no interview with the reporter, or were incorrectly quoted. His testimony, therefore, stands uncontradicted and unimpeached.

Local 52 after being out on strike for a short time, unanimously voted to return to work. Later the stone derrick men returned, although the International was strongly opposed to that action. With reference to the return of Local 52 members, the defendant Morrin, in the issue of The Bridgemen's Magazine for April, 1925, said in part:

"Local 52 members return to work with scab iron workers.

"* * * Local Union No. 52 were removed and remained off several days. However, through an ill-advised

action the members of Local Union No. 52 were ordered back to work under the guise of an imaginary unauthorized agreement which they claim they had with their employers. This was in direct violation of the plans and policies established by the General Executive Council and outlined to them at their meeting and it is to be regretted that Local 52 has taken this most unwise, unreasonable and unprincipled stand. It simply means that union iron workers, members of Local Union No. 52, are working with scab iron workers of their own trade and I do not see how any local, the officers and members thereof, can justify such a course. Subterfuge of course may be used and advantage taken of technicalities, especially as they did hiding behind a supposed agreement. But that does not lessen the enormity of this offense. It would seem to me that every member of Local Union No. 52 would hide their heads in shame when they consider that they are practically acting in such a capacity to the detriment of the members of our International Association. * * *"

[fol. 1983] As to the return to work of the stone derrick men, the defendant Morrin says in The Bridgemen's Magazine (p. 126):

"Stone Derrick Men return following finishers' betrayal.

"Local Union No. 197 removed their men under instructions of the general Executive Council from the stone derrick work in New York City on all buildings in the metropolitan district and their valuable assistance was very helpful. They remained steadfast with International for a considerable time. However, Local Union No. 52 had seen fit to practically scuttle the International ship by going back in on the job. Pressure was brought to bear on the stone derrick men and other tradesmen displacing them which brought about their decision to return to work also, which they have done. However, I feel confident that such action would not have been taken by the stone derrick men were it not for the unfortunate and discreditable action of Local No. 52. * * *"

By the end of September, 1924, the plaintiffs and other members of the league were proceeding with their work without molestation and with full complements of work-

men. Strike-breakers had been employed in the early days of the strike, but it does not appear what proportion, if any of them, were still at work in September. Regular picketing had been discontinued although there is evidence of sporadic picketing on a small scale thereafter. The strike was never formally called off, but the evidence all tends to show that actually it was ended by October first (S. M., pp. 919, 921, 994). The erectors had all the men they cared to employ and plaintiffs contend, and the evidence tends to prove, that after September there was no strike actually in progress or labor trouble between them and their men; that their relations with such of their em-
[fol. 1984] ployees as had not returned to work had terminated; and that they were at peace with their employees and were entitled to conduct their business in their own way without interference from the International or its locals, with whom they had no contractual relations.

The evidence tends strongly to prove that the program above outlined and the measures employed in carrying it out became known to owners, architects and contractors, to members of the league and to all persons and firms actively interested in the building industry. The Bridgemen's Magazine was not only furnished to the local unions, thus becoming available to the members of the locals, but was sent to any one who might subscribe for it. The circular letters were mailed direct to owners, architects and general contractors, and these were followed up by personal visits and personal solicitation. With a bitter strike in progress when the first circulars were sent out, and with every one interested in the building industry keenly alive to what was transpiring from day to day which might affect him injuriously or otherwise, the conclusion is necessary that the details of this so widely disseminated plan, and the method of putting it into operation, must have been known to every one interested in the subject matter.

The evidence as above recited stands practically without contradiction. Neither the defendant Morrin nor any officer of the International or its locals was asked by defendants' counsel to deny, modify or explain any of their acts as testified to by many witnesses, or their declarations as printed in the official journal of the International. If the testimony of these witnesses is untrue or these declara-

tions are susceptible of any interpretation other than the [fol. 1985] clear import of the language used, the evidence to show this is in the possession of the defendants.

Plaintiffs contend that the defendants, with the object of forcing them to recognize the union and operate under closed shop conditions, and using in that behalf the great power and prestige of the International, have combined and conspired for the purpose of seriously injuring or destroying their respective businesses, by preventing or dissuading owners, architects and general contractors for the erection of buildings in the metropolitan district from giving to plaintiffs sub-contracts for the erection of the structural iron and steel in said buildings, employing in that behalf threats and intimidative measures calculated to cause, and which actually have caused, owners, architects and general contractors to be fearful and apprehensive that if such sub-contracts should be let to plaintiffs, strikes would follow which would delay the completion of the buildings, thereby causing great loss to the owners and general contractors, as well as to plaintiffs. In other words, plaintiffs contend that the defendants have conspired to use, have used and are still using, unlawful means to bring about an unlawful end, the unlawful end being the closed shop—a condition violative of public policy—and the unlawful means, threats and intimidation tending to and which have put owners, architects and contractors in fear and apprehension of serious injury to themselves if sub-contractors should be let to members of the league. Plaintiffs also insist that the actions of the defendants constitute an unlawful interference with interstate commerce.

Defendants contend, on the other hand, that the closed shop is legal, does not violate public policy, and that [fol. 1986] all means adopted and employed by them to induce plaintiffs and other members of the league to operate on a closed shop basis were within their legal rights and amounted only to lawful persuasion and legitimate competition and did not constitute threats or intimidation. Defendants do not deny that it was and still is their settled purpose to induce plaintiffs, by lawful means, to recognize the unions and operate on a closed shop basis. Neither do they deny that in carrying out this purpose they have attempted to induce owners, architects and general contrac-

tors to give their sub-contracts to contractors other than members of the league.

The crux of this controversy, therefore, is, first, whether the purpose of the defendants is unlawful and should be enjoined, and second, whether, if that purpose be lawful, it is attempted to be effectuated by unlawful means. This is the final test in contests of this character, as is definitely held in Interborough Rapid Transit Company v. Lavin, 247 N. Y., 65, where the court, speaking through Lehman, J., says:

"In this state the courts may interpose their mandates between contesting parties only where there is an attempt to effectuate an unlawful purpose, or to effectuate a lawful purpose by unlawful means."

The rule to be applied in determining the probative value of the evidence is found in Mammoth Oil Co. v. United States, 275 U. S., 13; 72 L. ed., 137. In that case it was sought to set aside certain leases of naval petroleum reserves on the ground, among others, that they had been obtained through a fraudulent conspiracy. Sinclair, the head of the alleged conspiracy, did not testify. It appeared that other evidence existed, within control of the alleged con- [fol. 1987] spirators, which was not introduced in opposition to the Government's case. The court held that the silence of Sinclair made strongly against the company, and that the non-production of evidence which he could offer justified the conclusion that the proof, if produced, would tend to sustain the charge. The court said:

"While Sinclair's failure to testify cannot properly be held to supply any fact not reasonably supported by the substantive evidence in the case (Northern R. Co. v. Page, 274 U. S. 65, 74; 71 L. Ed., 929, 933; 40 Fed., 47, Sup. Ct. Rep., 491) it may justly be inferred that he was not in position to combat or explain away any fact or circumstance so supported by evidence and material to the government's case [citing cases]. As to facts appearing to have been within the knowledge or power of Sinclair we find that the evidence establishes all that it fairly and reasonably tends to prove."

In the absence of denial or explanation by Morrin and his associates of their acts and declarations I must apply

this rule and hold that the evidences establishes "all that it fairly and reasonably tends to prove." In a word, if the evidence, fairly and reasonably considered, is sufficient to establish prima facie that defendants were and are attempting to effectuate an unlawful purpose or to effectuate a lawful purpose by unlawful means, I must so decide.

Certain preliminary questions should first be considered. Defendants claim that much of the evidence is remote, irrelevant and hearsay as to them, and therefore insufficient to connect them with the conspiracy. The evidence consists mainly of publications in the official journal, circulars sent to owners, architects and general contractors, declarations [fol. 1988] of officials of the International and its locals, and acts and conduct of its and their representatives testified to by many witnesses.

Certain declarations of general contractors and their agents were admitted for the limited purpose of showing their state of mind resulting from the campaign of defendants to induce them not to patronize plaintiffs, that is, as to whether defendants' activities had the effect of making them fearful of the consequences of giving further subcontracts to plaintiffs. The effect of this campaign upon owners, architects and general contractors was so satisfactorily shown by other evidence that in arriving at my conclusions I have disregarded these declarations altogether.

Regarding the numerous publications in the official journal prior to the strike of May 1, 1924, claimed by defendants as too remote, I find nothing in them showing any intention on the part of defendants to use any unlawful means to effectuate their purposes except, possibly, references to sympathetic strikes. They do show very clearly a determined and enduring purpose to induce plaintiffs to operate closed shop, and an equally strong determination of plaintiffs to continue their open shop policy and to resist all attempts to unionize them. They are pertinent evidence, therefore, to show the previous history of the contending parties, and their attitude toward one another during the years, so that their purposes and intentions might be more intelligently judged as of the crucial period commencing in July, 1924, when the new program to subdue the iron league was conceived.

I have drawn no inferences unfavorable to defendants from the published articles to the effect that certain officers of the International were involved in criminal proceedings, [fol. 1989] or that on one occasion the members of the union were advised to violate or ignore injunctions. These matters are altogether too remote to justify a conclusion that now, after the lapse of nearly 25 years, there still exists any disposition on the part of the International or its officers to defy the mandates of courts or otherwise indulge in criminal acts to accomplish their purposes. On the contrary, in The Bridgemen's Magazine of April, 1925, just after this action was commenced, and referring to it, appears the following:

"The court granted a temporary restraining order which of course tied the hands of the District Council and local officers of the Iron Workers' International Union because we have no desire to in any way violate any order of the court."

Neither was there anything in the calling of the strike of May 1, 1924, nor its prosecution during the months of May and June, to indicate an intention to use unlawful means. The strike was called partly to obtain an increase in wages from ten to twelve dollars per day, but mainly to bring about the "closed shop." While picketing was indulged in and there were the usual concomitants of a strike waged with earnestness and determination to win, there was comparatively little or no violence or other breach of the peace, and the evidence is insufficient to justify a conclusion that such as did occur was authorized by the committee in charge of the strike.

With this explanation, which, of course, does not go to the admissibility but only to the weight of the evidence, I consider all of it sufficiently connected up with defendants. It is well settled that after proof of a conspiracy, the dec- [fol. 1990] larations and conduct of the conspirators are competent evidence against one another. As said in the Hitchman case (245 U. S., 229):

"In order that the declarations and conduct of third parties may be admissible, in such a case, it is necessary to show by independent evidence that there was a combination between them and defendants, but it is not necessary

to show by independent evidence that the combination was criminal or otherwise unlawful. The element of illegality may be shown by the declarations themselves. The rule of evidence is commonly applied in criminal cases, but it is of general operation; indeed, it orginated in the law of partnership. It depends upon the principle that when any number of persons associate themselves together in the prosecution of a common plan or enterprise, lawful or unlawful, from the very act of association there arises a kind of partnership, each member being constituted the agent of all so that the act or declaration of one, in furtherance of the common object, is the act of all, and is admissible, as primary and original evidence against them. [Citing numerous cases.]"

Tested by this rule the declarations of any of the individual defendants who were representatives of the International, or any of its locals, are admissible against all of them. The Bridgemen's Magazine is admitted to be the official organ of the International, and is published by authority of its constitution. It describes itself as "the official monthly journal published by and devoted to the interests of the International Association of Bridge, Structural and Ornamental Iron Workers." Thus it is clearly the agent of the International, and such of its contents as appear to reflect the sentiments or policy of the association [fol. 1991] (and these only were admitted) are original evidence against it and the other members of the combination.

With the effect of the evidence thus limited let us analyze certain features of the situation. First, there is the effect of the vast power and influence of the International, which claims jurisdiction over all iron-workers' crafts in the building industry throughout the United States and Canada, and is engaged in a determined effort, which has continued for years, to bring about the unionization of the entire industry, already nearly complete in the metropolitan district of New York, the country's greatest industrial center, with the ultimate purpose of effecting closed shop conditions throughout the country.

The purposes and declarations of intention of an organization of that character, power, influence and standing in the industrial world, as well as its acts done in putting them into effect, stand on a different basis, so far as the

effect to be given them is concerned, than threats made by weak organizations incapable of carrying them out, or which, if carried out, would have little or no effect upon the industry in general, or upon the rights of the public. On this subject the Supreme Court, quoting from the Gompers case, say in the Hitchman case (245 U. S. 229):

"But the very fact that it is lawful to form these bodies [labor unions] with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights and appealing to the [fol. 1992] preventive powers of a court of equity. When such appeal is made, it is the duty of government to protect the one against the many as well as the many against the one."

Second, there is the standing or right of the International to act in or create any controversy on behalf of plaintiffs' employees. The strike of 1924 was never formally terminated by defendants. Such of the members of the union as returned to work did so in defiance of orders, thereby rejecting any control of defendants over them insofar, at least, as that particular employment was concerned. Plaintiffs' employees, therefore, union and non-union, must be treated as an independent body of men having no affiliation with defendants as an organized unit. Defendants' interest in them was only such as they naturally had in the well-being of all labor, irrespective of affiliations. When the strike was actually terminated, plaintiffs had practically a full complement of men; they hired men as they needed them without respect to their labor affiliations; such of their old employes as had not returned to work had their places filled by others; there was no existing dispute between plaintiffs and their employes respecting wages, conditions of employment or otherwise.

Under these circumstances, while it is unnecessary to characterize the International as an "officious outsider", it was not the authorized agent of plaintiffs' employes, and had no more right to create a grievance for them, or in-

jure plaintiffs' business, than any "outsider" would have had.

In Hitchman Coal & Coke Co. v. Mitchell, 245 U. S., 229, 62 L*d*. Ed. 260, it appeared that the United Mine Workers of America, a labor organization, attempted to unionize [fol. 1993] the mines of the plaintiff, whose employes were all non-union. With respect to the right of this organization to interfere at all with the employes of the Hitchman Company, the Supreme Court said:

"The fact that the employment is at the will of the parties respectively, does not make it one at the will of others. The employe has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and by the weight of authority the unjustified interference of *third persons* is actionable although the employment is at will." * * *

"The case involves no question of the rights of employes. Defendants *have no agency for plaintiff's employes*, nor do they assert any disagreement or grievance in their behalf. In fact there is none; but if there were *defendants could not without agency set up any rights that employes might have*. The right of the latter to strike *would not give to defendants the right to instigate a strike*. The difference is fundamental." * * * (Italics mine.)

Again:

"The present is not a case of merely withholding from an employer an economic need—as a supply of labor—until he assents to be governed by union regulations. Defendants have no supply of labor of which plaintiff stands in need."

In Interborough Rapid Transit Company v. Lavin, 247 N. Y. 65, it appeared that the Interborough had a union of its own employes which prohibited its members from joining other unions. The defendant Lavin and other attempted to induce these members to join a rival organiza- [fol. 1994] tion. A strike resulted which was unsuccessful. Then the defendants, apparently working in behalf of the rival organization, attempted to induce members of the plaintiff's union to join theirs and *conceal* that fact from their employers. The Court of Appeals left open the ques-

tion as to whether the defendants, representing the rival organization and thus being outsiders, had the right to influence the Interborough's employes to join their union and *conceal* that fact from their employers.

On that question the Court said:

"The plaintiff's employes may have the right to leave their organization singly or in combination. Yet interference with that organization by an *officious outsider* merely for the purpose of injuring the plaintiff, or inducement maliciously held out to the employes to leave the organization, might constitute a wrong which the courts would have power to remedy. (Beardsley v. Kilner, 236 N. Y. 80.) * * * They [the defendants] have urged the plaintiff's employes to join the Amalgamated Association *secretly* and to *conceal* their new affiliations from their employer while remaining in its employ. It may be that such action on their part goes beyond the limits of permissible *interference by an outsider* in the relations between employer and employe. * * * Even though we should assume, without deciding, that the plaintiff's employes are themselves not under a contractual or other legal obligation to court discharge by information to the plaintiffs that they are joining the Amalgamated Association the question would still remain whether the defendants are justified in urging the employes to *conceal* facts which if disclosed would lead inevitably to their discharge. That question has not been argued on this appeal. We do not answer it [fol. 1995] now. Many facts must enter into its solution. Not all appear in this record. We merely state the question to point out that we are in no wise determining it." (Italics mine.)

Third, the position of owners, architects and general contractors in the controversy. They are third parties—neutrals—who may suffer serious injury if they will not join defendants in their efforts to injure plaintiffs. The quarrel is between defendants and the iron league, and defendants seek to use these innocent third parties as a club to subdue the league. Their intention in this regard is shown by publications in the official journal. For instance, in the Bridgemen's Magazine for October, 1924, in a report of the defendant Morrin, he said:

"* * * in this strike we determined that we were going to squeeze the fellow that we had to squeeze because in the first place the fellow that needed to be woke up was the owner, the architect and the fellow who had the contract to let. Those were the lines we worked on for the first three months of the strike. * * * We had to go out and establish to those owners that we were in a position to command consideration and we did. We have had a number of large jobs, like apartment houses, that have been delayed so long that they are now behind the renting period. I know of one man who was down claiming that he was going to lose considerable rents and the amount involved was something like $480,000. * * *"

"We established with those owners, architects and contractors the fact that there was a real live fighting Iron Workers' organization in this district. * * *"

"* * * the owners, employers and architects have learned a bitter lesson by the delays caused by this strike. [fol. 1996] I feel very confident that within a year's time we will be able to bring pressure to bear on these fellows to induce them to consider the letting of their contracts to fair contractors and when that is done our fight will be won here. We are in the position of an army. * * *"

The sentence in the Hitchman case, viz., " 'So use your own property as not to injure that of another person'; but by more proper interpretation, 'so as not to injure the rights of another' " seems to apply in full force to the pressure brought to bear on these neutrals.

Fourth, injury to the public resulting from defendants' acts. Besides the immediate and direct damage that plaintiffs' business might suffer, the means employed by defendants would naturally tend to disturb the freedom and independent action of all property owners contemplating entering into building contracts; of all architects employed by them to draw plans and supervise construction; all general contractors, including those operating closed shop; all sub-contractors operating closed shop whose employes might be ordered to strike sympathetically; all employes on buildings who, although at peace with their employers, might be ordered out on sympathetic strikes; and indirectly all who deal with owners, architects, general contractors, sub-contractors and employes. Such a condition of affairs,

especially when attempted to be effectuated in a large and populous area, and in an industry of great magnitude, would have such a widespread effect and involve such grave economic disturbances as to affect seriously the free and natural flow of commerce and thus cause injury to society itself.

[fol. 1997] As was said in Iron Molders' Union v. Allis-Chalmers Co. (C. C. A. Sixth Circuit), 166 Fed. 45, 51:

"In contests between labor and capital the only means of injuring each other that are lawful are those that operate directly and immediately upon the control and supply of work to be done and of the labor to do it, and thus directly affect the apportionment of the common fund, for it is only at this point exists the competition the evils of which organized society will endure rather than suppress the freedom asd initiative of the individual. But attempts to injure each other by coercing members of society who are not directly interested in the pending controversy to make raids in the rear cannot be tolerated by organized society, for the direct, the primary attack is on society itself."

Fifth, the right of plaintiffs to conduct their business in their own way. This is a right of property protected by the constitution (Truax v. Corrigan, 257 U. S. 312, 66 L. Ed. 254). As said in the Gompers case, 221 U. S. 418, 55 L. Ed., 797, and quoted in the Hitchman case:

"The court has frequently held that the employer is as free to make non-membership in a union a condition of employment as the workingman is free to join the union, and that is a part of the constitutional rights and private property, not to be taken away even by legislation, unless through some proper exercise of the paramount police power."

The vast power of the International; its ability to effectuate its purpose to injure unless plaintiffs yield the matter in dispute; its determination to succeed; its intention, forcibly impressed on plaintiffs and innocent third parties, [fol. 1998] to injure them unless they submit; the partial

success of its efforts and public injury resulting therefrom; its want of authority to speak for plaintiffs' employes—all these are elements of great potency in determining whether a case of "unlawful means to effectuate" defendants' purposes is made out.

In Hitchman Coal & Coke Co. v. Mitchell, supra, representatives of the United Mine Workers of America, a labor organization, sought by unfair and deceptive practices to induce plaintiff's non-union workmen to join the union, in violation of their contracts of employment. The Court held that an employer who has made non-membership in a labor union a condition of remaining or continuing in employment is entitled to be protected in the enjoyment of the resulting status, as in any other legal right, saying further:

"In any aspect of the matter it cannot be said that defendants were pursuing their object by *lawful* means." * * *

"Upon all the facts, we are constrained to hold that the purpose entertained by defendants to bring about a strike at plaintiff's mine in order to compel plaintiff, through fear of financial loss, to consent to the unionization of the mine as a lesser evil, was an unlawful purpose, and that the methods resorted to by Hughes were unlawful and malicious methods, and not to be justified as a fair exercise of the right to increase the membership of the union."

In Eagle Glass & Manufacturing Co. v. Rowe, 245 U. S., 275, 62 L. Ed. 286, it was held that a conspiracy of a labor organization to induce employees to violate their contracts with their employers, which provided that during their employment they would not join a labor union, constituted an unlawful method of compelling the employer to unionize [fol. 1999] its factory and should be enjoined.

Neither of these cases, it will be observed, involved any question of boycotting, yet the Supreme Court held that the plaintiff's rights had been unlawfuly invaded.

There is considerable confusion in different jurisdictions as to whether and under what circumstances boycotts, primary or secondary, may be enjoined. Likewise. the terms "primary" and "secondary", as describing the boycott, lack harmonious definition. It seems, generally speaking, that a primary boycott is one used against an industrial

antagonist directly, while a secondary boycott is against an outsider because of his influence or connection with the antagonist. In some states both primary and secondary boycotts are held illegal, in others legal. As said by Mr. Justice Lamar in the Gompers case:

"Courts differ as to what constitutes a boycott that may be enjoined. All hold that there must be a conspiracy causing irreparable damage to the business or property of the complainant. Some hold that a boycott against the complainant by a combination of persons not immediately connected with him in business, can be restrained. Others hold that the secondary boycott can be enjoined, where the conspiracy extends not only to injuring the complainant, but secondarily coerces or attempts to coerce his customers to refrain from dealing with him by threats that unless they do, they themselves will be boycotted."

Writing on the same subject Mr. Chief Justice Taft, in the prevailing opinion in Truax v. Corrigan, supra, says:

[fol. 2000] "It is to be observed that this is not the mere case of a peaceful secondary boycott, as to the legality of which courts have differed and states have adopted different statutory provisions. A secondary boycott of this kind is where many combine to injure one in his business by coercing third persons, against their will, to cease patronizing him by threats of similar injury. In such a case the many have the legal right to withdraw their trade from the one, they have the legal right to withdraw their trade from third persons, and they have the right to advise third persons of their intention to do so when each act is considered singly. The question in such cases is whether the moral coercion exercised over a stranger to the original controversy by steps in themselves legal becomes a legal wrong."

Duplex Printing Press Co. v. Deering, 254 U. S., 443, 65 L. Ed. 349, involved charges of interference with interstate commerce by the use of the secondary boycott. Following Pettibone v. United States, 148 U. S., 197, 37 L. Ed. 419, it defines a conspiracy as "a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or to accomplish a purpose not in

itself criminal or unlawful by criminal or unlawful means." And a secondary boycott is defined as a combination not merely to refrain from dealing with a person or to advise or by lawful means persuade his customers to refrain, but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold patronage through fear of loss or damage to themselves should they see fit to deal with him.

In New York neither a primary nor a secondary boycott is unlawful per se. Where the boycott, even though sec- [fol. 2001] ondary, is of non-union made materials or articles of manufacture, and there is no intention maliciously to injure employers or third parties, but all acts complained of are committed in an honest effort to advance the legitimate aims of labor, such acts are not unlawful and may not be enjoined. On the other hand, secondary boycotts of particular dealers or manufacturers, where no question of boycotted material is involved, should be enjoined, if there exists a malicious intent and purpose to destroy the good will or business of such dealer or manufacturer (Bossert v. Dhuy, 221 N. Y., 355; Auburn Draying Co. v. Wardell, 227 N. Y., 1; Aeolian Co. v. Fisher, 27 F., 2d, 560).

It seems that more latitude is allowed labor in boycotting manufactured materials, thus indirectly harming their manufacturer, than in boycotting the manufacturer himself directly. Whether this distinction is sound I need not attempt to determine, but its existence is referred to by Mr. Justice Brandeis in his dissenting opinion in the Duplex case. After stating that his view is in harmony with the views of the Court of Appeals of New York, he continues:

"For in New York, although boycotts like that in Loewe v. Lawlor, 208 U. S., 274, * * * *are illegal because they are conducted, not against a product, but against those who deal in it*, and are carried out by a combination of persons, not united by common interest but only by sympathy (Auburn Draying Co. *v.* Wardell, 227 N. Y., 1, * * *), it is lawful for all members of a union, by whomever employed, to refuse to handle *materials* whose production weakens the union." (Italics mine.)

In Auburn Draying Co. v. Wardell, 227 N. Y., 1, it appeared that the union notified plaintiff that unless it took [fol. 2002] necessary means to get its men to join the union

it would be placed on the unfair list. Plaintiff's employees refused to join. Thereupon, because of notices sent to builders, plumbers and others, they discontinued dealing with plaintiff for fear of loss of business or labor troubles.

In the course of a very learned discussion of the whole subject, the court say:

"The defendants are intentionally attempting to coerce the plaintiff to unionize its business by aggressively inducing its established and potential customers to ignore its existence in order to be free from the loss and injury which the action of the defendants would otherwise bring to those customers" (p. 10).

"The defendants were an organized combination with a unified intent and purpose, causing irreparable damage to the business and property of the plaintiff. Financial pressure, loss of business, interference with freedom of action were imposed by them in order to force the unionization. The law should be and is that the means were unjustifiable and unlawful and the defendants should be enjoined from using them (Hitchman Coal & Coke Co. v. Mitchell, 245 U. S., 229; Burnham v. Dowd, 217 Mass., 351; Beck v. Railway Teamsters' Protective Union, 118 Mich., 497; Purvis v. United Brotherhood, 214 Pa. St., 348; Fink & Son v. Butchers' Union No. 422, 84 N. J. Eq., 638; Harvey v. Chapman, 226 Mass., 191; W. A. Snow Iron Works, Inc. v. Chadwick, 227 Mass., 382; Martell v. White, 185 Mass., 255; Cornellier v. Haverhill Shote Manufacturers Assn., 221 Mass., 554; New England Cemet Gun Co. v. McGivern, 218 Mass., 198; Bausch Mach. Tool Co. v. Hill, 120 N. E. Rep., 188 (Mass.); Smith v. Bowen, 121 N. E. Rep., 814 (Mass.))" (p. 12).

In Bossert v. Dhuy, supra, it was held that the secondary boycott therein involved was not unlawful, but the decision [fol. 2003] was predicated on findings of fact which were held to be controlling, viz., that defendants did not intend maliciously to injure plaintiffs. This renders this decision of no importance here because of my finding, hereinafter made, that the defendants were actuated by a malicious intent and purpose to injure plaintiffs. The court, further limiting the scope of this decision, say:

"In the case now before us, if the defendants had called upon the public generally to discontinue using the plaintiffs' material, and had sought to prevent all persons by communi-

cations, written or otherwise, from dealing with the plaintiffs, their acts would have been illegal."

Exchange Bakery v. Rifkin, 245 N. Y., 260, relied on by defendants, involved the legality of peaceful picketing of a restaurant. The court held that notwithstanding the absence of an actual strike, equity has no power to enjoin such picketing when there are no threats, intimidation or kindred disorders; and that despite incidental damage to the employer, labor may combine to accomplish that which is lawful so long as the means employed are proper. Three judges dissented. However, the court clearly laid down the rule later approved in Interborough v. Lavin, that "any combination must be for lawful ends secured by lawful means," and differentiated the case from those involving boycotts, saying:

"In writing as we have done, we have in mind cases where the strike, the picketing or the lockout is made use of by associates in the same trade or business where the end sought therefor directly affects those, masters or men, engaged therein. We do not consider so-called sympathetic [fol. 2004] strikes, boycotts or lockouts where interest is more remote. Questions that may arise under such circumstances are not before us."

In Aeolian Co. v. Fisher, 27 F. (2d), 650, the District Court denied a motion for a temporary injunction. This order was affirmed by a divided court (29 F. 2d., 679). It was held by the District Court that while a secondary boycott is not illegal per se under the law of New York, it is condemned when inspired by malicious intent and purpose to destroy the good will or business of those against whom it is directed. The facts were somewhat similar to the instant case but they did not disclose any affirmative and aggressive campaign to prevent plaintiffs, through coercive pressure brought to bear on innocent third parties, from obtaining new contracts.

This is by no means a complete resume of the New York decisions on this subject; but it should serve to show that there is no inconsistency between them and the decisions of the United States Supreme Court, at least insofar as the principles controlling this case are concerned. All recognize the rule that means employed to effectuate a given end,

in order to be enjoined, must be unlawful, and that secondary boycotts, when directed, not against a product, but against the persons who deal in it, when inspired by malicious intent to injure those against whom it is directed, constitute "unlawful means." They all agree that the principle underlying this doctrine is that while both employers and employes have fundamental rights which they are entitled to enforce and defend, those rights are not so absolute that they may be exercised by either against the other without qualification, but that, like other rights that exist in [fol. 2005] civilized society, they must always be exercised with reasonable regard for the conflicting rights of others (Hitchman Coal & Coke Co. v. Mitchell, supra).

The harmony existing in the decisions in these respects makes the disposition of this case depend upon a question of fact, viz., whether the concerted action of defendants exhibits a malicious intent to injure or destroy plaintiffs' business by the use of the secondary boycott, or, without regard to nomenclature, by any conduct constituting an unlawful invasion of plaintiffs' rights.

The International is a combination which, although organized for lawful purposes, might be used by the officials controlling its activities to commit unlawful acts. Through these officials it conceived and attempted to effectuate a plan to subdue the iron league by bringing "pressure" to bear on innocent third parties. Its great power and prestige gave this pressure a driving force and effect it would not otherwise have had. Although the plaintiffs, and their associates in the league, themselves constituted a powerful combination, they were helpless against efforts to influence the action of these neutrals, who were not in any way associated with the league. Actually there was double pressure, that brought to bear on third parties directly, which might involve serious financial loss to them, and that exerted against plaintiffs indirectly, arising through danger of loss of patronage from those third parties.

That the defendants intended injury to plaintiffs' business unless they abandoned their open shop policy is quite clear. To hold otherwise would render the whole plan innocuous. One cannot read the articles in the Bridgemen's Magazine, the interviews in the New York Times, the circular letters sent out from time to time, the testimony as [fol. 2006] to sympathetic strikes of locals 52 and 197, the

testimony as to interferences with the orderly course of work on many jobs on which the league had sub-contracts, and as to the loss by a member of the league, through defendants' interference, of at least one sub-contract, without being convinced of the defendants' definite purpose, by concerted action amounting to a conspiracy, to injure plaintiffs' business.

But whether a purpose is shown intentionally to injure owners, architects and general contractors depends on other considerations. The articles referred to indicate that defendants' representatives delegated to call on these third parties personally were instructed to point out to them the advantage of complying with the defendants' wishes, to request that they favor union contractors, and to make all honorable efforts to induce them to give their steel erection work to such contractors. This evidence might indicate, considered alone, that only peaceful persuasion was to be used; but any such inference is repelled when this evidence is considered in connection with other expressions and actions of defendants. Thus in the October number, the defendant Morrin said, referring to these neutrals, that "we determined to squeeze the fellow that we had to squeeze", and that "the fellow that needed to be woke up was the owner, the architect and the fellow who had the contract to let". There are expressions criticizing former actions of these third parties and indicating a clear intention to bring pressure to bear on them. Indeed, the word "pressure" is actually used in this article, the expression in part being "we will be able to bring pressure to bear on these fellows". The interviews in the Times article show that the the strikes of locals 52 and 197 were called [fol. 2007] to induce owners, architects and general contractors to bring pressure to bear on the league. These sympathetic strikes and interferences with other pending contracts were acts well calculated to impress these neutrals with the determination of defendants to effectuate their purposes, even if strikes had to be called on all buildings on which the league had sub-contracts.

The attitude of defendants toward owners, architects and general contractors is clearly indicated by the language of the circular letters, interpreted in the light of all the other facts and circumstances. These letters, which were sent

direct to owners, architects and general contractors as new buildings were announced in Dodge's reports, after referring to the "useless financial losses" that result from delays and stating that "The Iron League of New York, about fourteen in number" "insist on using non-union men on their steel erection work", continue:

"The members of the Bridge, Structural and Ornamental Iron Workers' Union *work* for any employer who conducts his erection work under *union conditions* and pays union wages, whether he be owner, architect, general contractor, *sub-contractor,* builder or *steel erector.*" (Italics mine.)

This language meant, when construed in the light of the disturbed conditions then existing, that members of the unions would not "work" for "sub-contractors" or "steel erectors", or any employers, who use "non-union men on their steel erection work"; and these words, used by a powerful organization many times in the course of a determined campaign to subdue plaintiffs, had acquired, to quote from Gompers v. Buck's Stove & R. Co., 221 U. S. [fol. 2008] 438, 55 L. Ed. 805, "a force not inhering in the words themselves, and therefore exceeding any possible right of speech which a single individual might have. Under such circumstances they became what have been called 'verbal acts', and as much subject to injunction as the use of any other force whereby property is unlawfully damaged".

These circulars, therefore, emphasized as they were by publications in the official journal, newspaper interviews, personal follow-up calls, sympathetic strikes and interferences with work on pending jobs, constituted a warning, backed by all the power of the International, that its future policy would be to strike all buildings on which any of the members of the iron league might be awarded sub-contracts.

This warning, repeated whenever a new building contract was to be let, was made so emphatic by defendants' other activities as to affect the freedom and independence of owners, architects and general contractors, who, knowing of the long-continued efforts of the International to bring the league to terms, and of the campaign then being carried on for that purpose, quite naturally became apprehensive that there would be "labor troubles" on future

construction if they continued to patronize the league in awarding sub-contracts.

Weighing the evidence according to the standard prescribed in Mammoth Oil Co. v. United States, supra, this conduct amounted to threats and intimidation by a combination and conspiracy, directed against third parties not in any way connected with any controversy between plaintiffs and defendants, to inflict a substantial financial loss upon them unless they submitted to defendants' demands. It contains all the elements of a secondary boycott which [fol. 2009] involved not only serious injury to neutrals, but an invasion of plaintiffs' rights as well (see Martin on the Modern Law of Labor, Sec. 51, p. 72; Sec. 77, p. 117; Sec. 69, p. 104).

That defendants' actions were inspired by malice in the legal sense, as distinguished from actual malice, appears from the definition found in the Hitchman case:

"Intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage another in that other person's property or trade, is actionable, if done without just cause or excuse. And the intentional infliction of such damage upon another without justification or excuse is malicious in law."

Therefore, I find the fact to be that the defendants, in carrying out their plan to cause the plaintiffs and the other members of the iron league, against their will, to abandon their open shop policy, intentionally entered into a conspiracy to effectuate said plan, and that the acts and conduct of defendants in that behalf were done and committed with the object and purpose intentionally to injure or destroy plaintiffs' business unless they would agree to operate on a union closed shop basis, and intentionally to injure the business and property rights of owners, architects and general contractors, unless they would refuse to award sub-contracts to plaintiffs and other members of the league. I further find that the said acts and conduct of defendants were done maliciously, that is, intentionally and without legal excuse or justification.

Whether defendants' action be considered from the standpoint of injury to plaintiffs' business amounting to an invasion of their constitutional rights (Hitchman Coal & [fol. 2010] Coke Co. v. Mitchell, supra; Eagle Glass Manu-

facturing Co. v. Rowe, supra), or as a secondary boycott involving threatened injury to the business of innocent third parties, or detriment to the general public, the legal conclusion from all the facts must be that they constituted an "unlawful means" to effectuate defendants' purposes (Auburn Draying Co. v. Wardwell, 227 N. Y. 1; Duplex Printing Press Co. v. Deering, 254 U. S. 443, 65 L. Ed. 349; Eagle Glass Manufacturing Co. v. Rowe, 245 U. S. 275, 62 L. Ed. 286; Bossert v. Dhuy, 221 N. Y. 355; Interborough v. Lavin, 247 N. Y. 65; Gompers v. Buck's Stove & R. Co., 221 U. S. 418, 55 L. Ed. 797; Truax v. Corrigan, 257 U. S. 312, 66 L. Ed. 254).

To summarize the grounds upon which I base this conclusion: the means employed by defendants to effectuate their purposes were without legal excuse or justification and therefore unlawful (1) because said "means" have caused intentional damage to plaintiffs' business through threatened injury to the business of innocent third persons, (2) because they amounted to intentional coercion of neutrals for the purpose of injuring plaintiffs, (3) because they constituted an injury to the general public, and (4) because, after the strike of 1924 was actually over, and plaintiffs were carrying on with a full complement of workmen, defendants had no authority or standing to interfere between plaintiffs and their employes, or to create or attempt to remedy any grievance in their behalf.

Plaintiffs contend that a condition of complete unionization of a great industry extending over a large territory, with the ultimate purpose of extending it throughout the [fol. 2011] country would be unlawful as violative of public policy, and that therefore defendants are attempting to effectuate an unlawful end. There are persuasive decisions in some states which appear to sustain this contention. In my view it is unnecessary to decide the question. Regarding the end as unlawful, that, in and of itself, does not entitle plaintiffs to an injunction. They have entered into no closed shop agreements. They are just as determined as ever not to do so or to submit to closed shop conditions. Any lawful means employed to induce them to change their policy would be ineffective. Their power of resistance, which has withstood pressure for over twenty years, does not appear to have weakened. They may successfully resist any lawful means employed by defendants by continu-

ing to refuse to operate closed shop, or sign any closed shop agreements. Therefore, as they have in their own hands the means of preventing defendants from accomplishing an unlawful end, where only lawful means are employed, they show no good reason for equitable interposition by injunction on that ground.

Defendants attempt to justify their actions by claiming that they amount only to lawful competition. In other words, they insist that they have the right to solicit business for contractors who are fair to them and to prevent other contractors whom they consider unfair from getting business. I see no force in this position. Defendants are not engaged in the erection of structural iron and steel. They are not asking that sub-contracts be let to the International or any of its locals. They are simply volunteers, unauthorized by the plaintiffs' employees or by the "fair" contractors, attempting to get business for them at the expense of the "unfair" contractors, and this when no strike is in progress.

[fol. 2012] On this question it is said in the Hitchman case:

"Defendant's acts cannot be justified by any analogy to competition in trade. They are not competitors of plaintiff; and if they were their conduct exceeds the bounds of fair trade. Certainly if a competing trader should endeavor to draw the custom from his rival, not by offering better or cheaper goods, employing more competent salesmen or displaying more attractive advertisements, but by persuading his rivals' clerks to desert him under circumstances rendering it difficult or embarrassing for him to fill their places, any court of equity would grant an injunction to restrain this as unfair competition."

Viewing the whole case from every angle, I cannot regard it as one involving a controversy between plaintiffs and the workmen in their employ after the failure of the strike. These men went to work under plaintiffs' conditions and neither complained nor now complain of unfair treatment. They have not struck nor threatened to strike. They have no need of a champion to redress their grievances, for they have asserted none.

The contest is really between a powerful labor organization, on the one hand, and a powerful employers' organiza-

tion, on the other, over conflicting principles or policies, disassociated from any existing dispute as to labor conditions on any specified work. The point of conflict is where the league's open shop policy meets the International's closed union shop policy. Defendants seek to establish their policy, not in aid of plaintiffs' employes on any particular job or jobs, but for the benefit that will thereby flow to labor generally. And they are endeavoring to break down plaintiffs' resistance, and to compel them to aban- [fol. 2013] don their policy, by injuring their business through pressure brought to bear on their customers, the owners, architects and general contractors.

If plaintiffs were attempting to compel defendants to abandon their closed union shop policy by coercive measures calculated to injure their cause, courts of equity should and undoubtedly would enjoin them for unlawful encroachment on defendants' constitutional rights. For precisely the same reasons the defendants should be prevented from encroaching upon plaintiffs' fundamental rights. The rule that one's rights must always be exercised with reasonable regard for the conflicting rights of others (Hitchman Coal & Coke Co. v. Mitchell, supra), must work both ways.

Plaintiffs' contention that the conduct of defendants constitutes an unlawful interference with interstate commerce is based upon the fact that in some cases sub-contracts include the fabrication in other states of steel to be shipped into and erected in New York. It is insisted that such contracts are interstate in character because contemplating the interstate shipment of steel in their performance, and that the erection of the steel so shipped is an inseparable part of an interstate transaction which must be treated as a whole. By preventing them from getting such sub-contracts, plaintiffs assert, defendants are preventing the shipment of steel into the state.

There is no evidence showing the precise method or process of erecting steel; but it is common knowledge that it requires local labor and erecting equipment and machinery; also that each piece of fabricated steel ultimately becomes an integral part of the building.

[fol. 2014] Under these circumstances the work of erecting steel must be regarded as merely local, and as constituting no part of an interstate transaction (General Railway Signal Co. v. Virginia, 246 U. S. 500, 62 L. Ed. 854;

Browning v. Waycross, 233 U. S. 16, 58 L. Ed. 828; Kansas Steel Co. v. Arkansas, 269 U. S. 148, 70 L. Ed. 204); and interference with such work, by strikes or otherwise, would not amount to interference with interstate commerce.

The facts do not bring this case within the doctrine of those decisions dealing with machines, such as a printing press or ice plant, shipped into a state in parts to be there assembled and erected by skilled labor and tested before delivery (York Manufacturing Co. v. Calley, 247 U. S. 21, 62 L. Ed. 963).

Moreover, there was here no intent or purpose to interfere with interstate commerce. Defendants' ultimate object was to compel plaintiffs to submit to the closed shop policy or suffer the consequences in loss of contracts. Any reduction in the amount of fabricated steel shipped into the state resulting from the success of defendants' endeavors to prevent plaintiffs from getting subcontracts, would be merely an incidental injury, if any, to interstate trade. Plaintiffs' steel was not condemned as unfair. Interference with its movement was not defendants' primary aim. Consequently there was no actionable interference with interstate commerce (Bradford Cut Stone Co. v. Journeymen S. C. Assn., 274 U. S. 37, 71 L. Ed. 916; Industrial Assn. of San Francisco v. United States, 268 U. S. 64, 69 L. Ed. 54).

The evidence shows that defendants intend to continue their efforts completely to unionize the building industry in the Metropolitan District of New York and elsewhere. [fol. 2015] The union closed shop is their settled policy. They have not indicated any intention to recede from this position, nor to abandon their plan to force the plaintiffs to yield the matter in dispute, nor to refrain from doing the acts and things complained of. Indeed, their attitude is that they are legally justified, so long as they commit no breach of the peace, in their endeavors to prevent owners, architects and contractors from patronizing plaintiffs by the methods which I have found unlawful. Consequently the injury to plaintiffs resulting from defendants' acts must be regarded as a continuing one involving injury to property, and pecuniary loss incapable of present estimation. This entitles plaintiffs to an injunction.

Local 52, Edward Coleman, its President, and Henry Wolf asked that the action be dismissed as to them. Although the members of this local struck in February, 1925,

on orders of defendants, when they had no quarrel with their employers, and merely in sympathy with the structural iron workers, the union very soon thereafter, by formal resolution, called off the strike and ordered its men to return to work. There is no evidence showing that local 52 or its officials took any other part in the efforts to use undue pressure on plaintiffs, or on owners, architects and general contractors. By refusing to continue to obey the orders of the International it withdrew from the conspiracy to injure plaintiffs' business. It still remains, however, a member of the International and subject to its lawful orders. Whether, if new orders were given, it would obey or disobey cannot now be foreseen. If and when it should conclude again to follow defendants' orders, the injunction against the other defendants will include it and its officers [fol. 2016] as agents or representatives of defendants. But as matters now stand these defendants are entitled to a dismissal.

Defendants have moved to strike out certain parts of the testimony. Where, as here, a combination is established by independent evidence, testimony to show that its objects and purposes are unlawful takes a very wide range (Hitchman Coal & Coke Company, 245 U. S. 229; 62 L. Ed. 260). In view of this I am satisfied with the rulings made at the trial and accordingly deny the motions to strike out.

Defendants do not in their briefs ask any relief based on their affirmative defenses and counterclaims. Obviously, however, my conclusions on other branches of the case would mean the denial of any such relief.

The decree should run against the defendants, Paul J. Morrin, individually and as president of the International, Wm. J. McGinn, individually and as agent of the International, Local No. 40, and Charles Massey, individually and as agent thereof, Local No. 361, and Earl Calvert, individually and as agent therefo, and Local No. 197, all of whom committed some overt act in aid of the conspiracy or otherwise actively participated in its activities.

Pursuant, therefore, to the power and authority vested in me by the order of reference, and after full consideration of the evidence and the law applicable thereto, I find and decide as follows:

1. That the defendants last above-named, their officers, agents, representatives and employees, should be perma-

nently restrained and enjoined from inducing, or attempt-
[fols. 2017-2036] ing to induce, owners, architects or general contractors to let no subcontracts to plaintiffs for the erection of structural iron and steel on buildings now being or to be erected in the Metropolitan District of New York, by sending to them circulars or other writings stating, threatening, warning or intimating, or by personally, or in any other manner, stating, threatening, warning or intimating, that members of the unions associated with the International may or will refuse to work on buildings upon which plaintiffs have or may have sub-contracts, or by ordering, instigating, carrying on or supporting sympathetic strikes on buildings upon which plaintiffs have or may have subcontracts, or from otherwise attempting by coercive pressure, threats or intimidation, or other unlawful means, to compel or influence owners, architects and general contractors not to patronize the plaintiffs.

2. That as to the other defendants the action should be dismissed without costs.

3. That plaintiffs are entitled to recover their costs and disbursements herein.

Dated October 30, 1929.

William M. Cannon, Referee.

[fol. 2037] In United States District Court for the Southern District of New York

Levering & Garrigues Company et als., Plaintiffs,

against

Paul J. Morrin, Individually and as President of International Association of Bridge, Structural & Ornamental Iron Workers, et als., Defendants

Final Decree

This cause coming on to be heard at this term upon the pleadings and proofs and the report and decision of the Master dated October 30, 1929, and the exceptions of the plaintiffs and defendants filed thereto, the said cause having been referred by consent to the Master to hear and de-

termine all the issues herein, and having been argued by Merritt Lane, Esquire, of counsel with Edward Maxson, Esquire, attorney for the plaintiffs, and Frank P. Walsh, Esquire, attorney for the defendants, and due consideration being had of the matter;

It is, on this 14th day of February, 1930, ordered, adjudged and decreed:

1. That the exceptions of the plaintiffs and the defendants to the report of the Master be, and the same are, overruled and the report be and the same is confirmed;

[fol. 2038] 2. That Paul J. Morrin, individually and as President of the International Association of Bridge, Structural and Ornamental Iron Workers; William J. McGinn, individually and as agent of the International Association of Bridge, Structural and Ornamental Iron Workers; Local No. 40 of the International Association of Bridge, Structural and Ornamental Iron Workers and Charles Massey, individually and as agent thereof; Local No. 361, International Association of Bridge, Structural and Ornamental Iron Workers and Earl Calvert, individually and as agent thereof; Local No. 197, International Association of Bridge, Structural and Ornamental Iron Workers, and all officers, agents, representatives and employees of the aforementioned defendants, and they are hereby permanently restrained and enjoined from inducing, or attempting to induce owners, architects or general contractors to let no sub-contracts to plaintiffs for the erection of structural iron and steel on buildings now being or to be erected in the Metropolitan District of New York, by sending to them circulars or other writings stating, threatening, warning or intimating, or by personally, or in any other manner, stating, threatening, warning or intimating, that members of the unions associated with the International may or will refuse to work on buildings upon which plaintiffs have or may have sub-contracts, or by ordering, instigating, carrying on or supporting sympathetic strikes on buildings upon which plaintiffs have or may have sub-contracts, or from otherwise attempting by coercive pressure, threats or intimidation, or other unlawful means, to compel or influence, owners, architects and general contractors not to patronize the plaintiffs;

[fol. 2039] 3. That a perpetual writ or writs of injunction issue out of this Court for the purpose aforesaid directed to the defendants and other above permanently enjoined;

4. That the bill be dismissed as against William J. Wade, individually; Edward Coleman, individually and as President of Local No. 52, International Association of Bridge, Structural & Ornamental Iron Workers; David Baxter, as President of Local No. 170, International Association of Bridge, Structural & Ornamental Iron Workers; Local No. 170, International Association of Bridge, Structural & Ornamental Iron Workers; John Snyder; Henry C. Wolf; and Owen J. O'Brien, be, and the same is hereby dismissed without costs;

5. That the defendants, Paul J. Morrin, individually and as President of the International Association of Bridge, Structural and Ornamental Iron Workers; William J. McGinn, individually and as agent of the International Association of Bridge, Structural and Ornamental Iron Workers; Local No. 40, International Association of Bridge, Structural & Ornamental Iron Workers and Charles Massey, individually and as agent thereof; Local No. 361, International Association of Bridge, Structural and Ornamental Iron Workers and Earl Calvert, individually and as agent thereof; Local No. 197, International Association of Bridge, Structural and Ornamental Iron Workers, do pay to the plaintiffs herein their proper costs, charges and disbursements herein, as taxed by the Clerk of this Court, amounting to the sum of $6,767.65, and that there be included in said taxed costs the amounts paid by the plaintiffs for the copies of the stenographic record for the use of the Master and of the plaintiffs, and any sums paid by [fols. 2040-2180] the plaintiffs or for which the plaintiffs may be liable for stenographic services to the Master, and for any sums paid by the plaintiffs or for which the plaintiffs may be liable for the Master's compensation, and that if the same be not paid within thirty days from this date, then at the request of the plaintiffs, or their counsel, an execution shall issue for the enforcement of the payment of said costs;

6. That there be allowed to William M. Cannon, Esq., as compensation for his services as Master herein, the sum of

$10,000.00 which sum was consented to, which said sum shall be borne and paid by the defendants hereinbefore enumerated within thirty days from the date of this decree;

7. That the temporary restraint granted by the order of this Court, dated the 11th day of March, 1925, and since continued by order of this Court, be, so far as inconsistent with the terms of this decree, and the same is hereby in all respects vacated, including the provision therein with respect to the injunction bond given by the plaintiffs, and that the said injunction bond be, and the same is hereby cancelled.

Frank J. Coleman, U. S. D. J.

[fol. 2181] In United States Circuit Court of Appeals for the Second Circuit

Levering & Garrigues Company, Heddon Iron Construction Company, Hay Foundry & Iron Works, and McClintic-Marshall Company, Plaintiffs-Appellees,

vs.

Paul J. Morrin, Individually and as President of International Association of Bridge, Structural and Ornamental Iron Workers, et al., Defendants-Appellants

Before Manton, L. Hand and Swan, Circuit Judges

Appeal from the District Court of the United States for the Southern District of New York

Suit in equity against Paul J. Morrin, individually and as president of the International Association of Bridge, Structural and Ornamental Iron Workers, and others, to enjoin defendant labor unions and persons associated with them from interfering with the plaintiffs' business. From a final decree granting a permanent injunction, the defendants have appealed. Decree reversed.

Frank P. Walsh, Solicitor for Appellants; Harold Stern, of Counsel.

Edward Maxson, Solicitor for Appellees; Merritt Lane, of Counsel.

OPINION

SWAN, Circuit Judge:

The plaintiffs are four corporations, three of which were [fol. 2182] organized under the laws of New Jersey and the fourth under the laws of Pennsylvania. They were engaged in fabricating outside of, and erecting within, the State of New York, and elsewhere, structural iron and steel. The steel was specially fabricated for a particular building and each plaintiff engaged in the work of erecting its steel under a subcontract made with the general contractor for the building. The plaintiffs were members of the Iron League of New York, an association of employers engaged in the erection of steel, and since 1906 the members of this organization have carried on their work under what is known as the "open shop" method, that is, they select their employees without reference to membership or non-membership in a labor union. The defendants are Paul J. Morrin, "individually and as president" of International Association of Bridge, Structural and Ornamental Iron Workers (a voluntary labor organization hereinafter referred to as the International), and several local labor unions and their officers and agents. The bill of complaint charges that the defendants are attempting to compel the plaintiffs to operate upon a closed union shop basis and that to effectuate this purpose they have, among other alleged illegal acts, put into effect a boycott of the plaintiffs within the metropolitan area in and about New York City by persuading, through threats and intimidation, owners, architects and general contractors not to deal with the plaintiffs. The referee, who took and reported voluminous evidence, found as a fact that the boycotting charge was established and that the defendants intend to continue their efforts. His report was confirmed, and a permanent in- [fol. 2183] junction issued to restrain the defendants from attempting to induce owners, architects or general contractors to let no subcontracts to the plaintiffs for the erection of structural iron and steel on buildings being or to be erected in the metropolitan district of New York, by threatening that members of the unions associated with the International will refuse to work on buildings upon which the plaintiffs may have subcontracts, or by instigating sympathetic strikes on such buildings, or from otherwise at-

tempting by coercive pressure, threats or intimidation, or other unlawful means, to compel or influence owners, architects or general contractors not to patronize the plaintiffs. To reverse this decree and injunction the defendants appealed.

After argument upon the merits, this appeal was reargued, at the suggestion of the court, upon questions of jurisdiction, and to these questions attention must first be directed.

Jurisdiction was based primarily on diversity of citizenship. As already noted the plaintiffs were corporations of New Jersey and of Pennsylvania. The defendants against whom the decree was entered are the following: Paul J. Morrin, individually and as president of the International Association of Bridge, Structural and Ornamental Iron Workers; William J. McGinn, individually and as agent of said International; Local No. 40 of said International and Charles Massey, individually and as agent thereof; Local No. 361 of said International and Earl Calvert, individually and as agent thereof; and Local No. 197 of said International. The bill of complaint alleges that Morrin is a [fol. 2184] citizen of Missouri and each of the other individual defendants a citizen of New York. Each of the three locals above named is alleged to be "a subsidiary local" of the International and "a resident, citizen and inhabitant of the State of New York". Local No. 40 is alleged to have its headquarters in Manhattan and Local No. 361 in Brooklyn; Local No. 197 is alleged to have "jurisdiction over stone derrickmen in the City of New York". The International is alleged to be "a voluntary labor organization" and "a resident, citizen and inhabitant of the State of Missouri", but the International itself was not made a party deefndant, although the case has been argued on the assumption that it was. None of the foregoing allegations of citizenship was denied in the answer, except with respect to McGinn, who set forth that he was a citizen of Massachusetts instead of New York. Although the venue was wrong as to Morrin and McGinn, objection to venue was a privilege personal to them and was waived by their failure to object. Seaboard &c. Co. v. Chicago, &c. Ry. Co., 270 U. S. 363, 365.

When federal jurisdiction is grounded on diverse citizenship, it must affirmatively appear in the pleadings or from

facts clearly proven, that diversity of citizenship exists between all the plaintiffs on the one hand and all the defendants on the other. Strawbridge v. Curtiss, 3 Cranch 267; Thomas v. Board of Trustees, 195 U. S. 207. For this purpose the shareholders of a corporation are conclusively presumed to be citizens of the state in which it was incorpo- [fol. 2185] rated, and their citizenship is then attributed to the corporation. St. Louis & S. F. Ry. v. James, 161 U. S. 545, 554. The plaintiffs would have us apply a similar presumption as to unincorporated labor unions because under the doctrine of the Coronado case, 259 U. S. 344, they may be sued in the association name. This decision liberalized procedure in this respect but did not hold that jurisdiction was to be correspondingly extended. That an unincorporated labor union is suable as a legal entity implies nothing as to the citizenship of its members for purposes of federal jurisdiction. See Dobie, Federal Jurisdiction & Procedure, p. 198. Moreover, in seeking to attach a presumption of citizenship in the state in which these unincorporated associations have their headquarters, the plaintiffs ignore the settled rule that the citizenship of the shareholders of a corporation attaches to the state of incorporation and not to the state in which the corporation has its principal place of business. Shaw v. Quincey Mining Co., 145 U. S. 444; Seaboard &c. Co. v. Chicago &c. Ry. Co., 270 U. S. 363, 366. Although the Supreme Court has not yet passed upon the precise issue, its decisions as to a joint stock company (Chapman v. Barney, 129 U. S. 677), a limited partnership association (Great Southern Fire-Proof Hotel Co. v. Jones, 177 U. S. 449) and a board of trustees (Thomas v. Board of Trustees, 195 U. S. 207) are strongly persuasive against the contention. In the case last cited it was held that an allegation that an unincorporated board of trustees is a citizen is not sufficient, and that there must also be an allegation that each member of the group has a citizenship [fol. 2186] different from that of the plaintiff. In the case at bar neither allegation nor proof asserts that all the members of the defendant unions are citizens of states other than New Jersey and Pennsylvania. In Russell v. Central Labor Union, 1 F. (2d) 412 (E. D. Ill.), it was held that, despite the Coronado case, for purposes of federal jurisdiction the actual citizenship of the individual members of an unincorporated labor association was determinative; and

this court held the same in Ex parte Edelstein, 30 F. (2d) 636, cert. denied, 279 U. S. 851; 42 Harv. L. Rev. 1079. See also Irving v. Joint District Council, 180 F. 896, 898 (C. C. N. Y.); Wise v. Brotherhood of Locomotive F. and E., 252 F. 961, 965 (C. C. A. 8); 34 Yale L. J. 564; 38 Harv. L. Rev. 510; 5 Col. L. Rev. 246; 19 Ill. L. Rev. 596. We are not disposed to reverse our ruling in Ex. parte Edelstein. Therefore the mere allegation that each of the local unions was a citizen of a state other than those of the plaintiffs was not sufficient to afford a basis for jurisdiction founded on diverse citizenship.

Before determining the effect of the failure to allege or prove diverse citizenship between the plaintiffs and the defendant labor unions, it will be well to consider the plaintiffs' contention that jurisdiction of the district court may be sustained upon another ground. Paragraph 18 of the bill of complaint alleges that each of the plaintiffs is engaged in interstate commerce and that the defendants have entered into an illegal conspiracy in restraint of such commerce; paragraph 20 alleges a violation of the plaintiffs' constitutional rights; and paragraph 21 invokes jurisdic-[fol. 2187] tion under the constitution and laws of the United States. These allegations the answer denied. Upon the issues of interference with interstate commerce and violation of the plaintiffs' constitutional rights, the referee found in favor of the defendants, and his conclusion was affirmed by the district court.

That the decision on these points was right is clear beyond dispute. The theory of the 18th paragraph of the bill is that since the steel to be erected by the plaintiffs in New York is shipped in from other states, the defendants' prevention of erection is an interference with interstate commerce. There is neither allegation nor proof that the activities of the defendants were in any way motivated by a desire to restrain the interstate trade of the plaintiffs. It is true that to the extent that the defendants succeed in preventing the plaintiffs from procuring subcontracts with general contractors for buildings to be erected in New York, the plaintiffs will bring in from other states smaller quantities of steel than they otherwise would, but such an interference is too indirect, incidental and remote to constitute a violation of the federal anti-trust laws. Industrial Association v. United States, 268 U. S. 64, 77, 82; Bedford

Cut Stone Co. v. Stone Cutters Assn., 274 U. S. 37, 46; United Leather Workers v. Herkert, 265 U. S. 457; United Mine Workers v. Coronado Co., 259 U. S. 344, 410; Aeolian Co. v. Fischer, 29 F. (2d) 679 (C. C. A. 2); and see Anderson v. Shipowners Assn., 272 U. S. 359, 364, where it is said that building is not commerce and "the fact that the materials to be used are shipped in from other states does not make building a part of such commerce". The acts of the [fol. 2188] defendants were directed toward preventing the use of the steel after it reached New York and affected the transportation of it only indirectly. Even less can be said in support of the contention that constitutional rights of the plaintiffs were violated; indeed, this point was not even briefed on this appeal.

But the plaintiffs urge that regardless of how these issues were decided, the assertion of a bona fide claim that the controversy involved the constitution and laws of the United States gave the court jurisdiction to decide all questions involved in the case. They rely upon the familiar principal, reasserted with the citation of many authorities in Siler v. Louisville & Nashville R. R. Co., 213 U. S. 175, where it is said at page 191:

"The Federal questions, as to the invalidity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the Circuit Court jurisdiction, and, having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only."

This principle has been frequently applied in subsequent cases. Louisville & N. R. R. Co. v. Garrett, 231 U. S. 298; Greene v. Louisville & Int. R. R. Co., 244 U. S. 499; Lincoln Gas Co. v. Lincoln, 250 U. S. 256; Davis v. Wallace, 257 U. S. 478; Southern Ry. Co. v. Watts, 260 U S. 519; Atlantic Coast Line Co. v. Daughton, 262 U. S. 413; Chicago & Great W. R. R. Co. v. Kendall, 266 U. S. 94. Yet it is not of universal application, for there is another familiar line [fol. 2189] of cases, where a charge of unfair competition is joined with a charge of patent or trademark infringement, in which, if the federal question is decided adversely to the plaintiff and no diversity of citizenship exists, the courts

have held that there is no federal jurisdiction to pass upon the issue of unfair competition. Of such a situation the Supreme Court said in Elgin Watch Co. v. Illinois Watch Co., 179 U. S. 665, 677, that " if the trademark were not lawfully registered, then jurisdiction could not be maintained". And this is substantially repeated in Leschen Rope Co. v. Broderick, 201 U. S. 166, and Stark Bros. Co. v. Stark, 255 U. S. 50, 52. See also Standard Paint Co. v. Trinidad Asph. Co., 220 U. S. 446, 456; Geneva Furniture Mfg. Co. v. Karpen & Bros., 238 U. S. 254. Numerous lower court authorities, mostly to the same effect, are gathered in Judge Denison's interesting opinion in Vogue Co. v. Vogue Hat Co., 12 F. (2d) 991 (C. C. A. 6); see also Ingrassia v. A. C. W. Mfg. Corp., 24 F. (2d) 703 (C. C. A. 2); Shiebel Toy & Novelty Co. v. Clark, 217 F. 760 (C. C. A. 6); Kasch v. Cliett, 297 F. 169 (C. C. A. 5). Nowhere, so far as we are advised, has the Supreme Court alluded to the limitation which its pronouncement in the Elgin and Leschen cases impliedly puts upon the general principle of the Siler case that a jurisdiction once acquired extends to all questions in the case. In the absence of an authoritative decision to point out the line of differentiation, we must attempt to harmonize the two lines of cases as best we may.

When a complaint challenges the validity of a state statute as infringing the federal constitution, questions depending upon the local law, such as the true interpretation [fol. 2190] of the statute, or its validity under the state constitution, underlie the very foundation of the plaintiff's cause of action. Such questions are necessarily involved in the controversy presented to the federal court. Compare Barney v. City of New York, 193 U. S. 430, which in so far as it implies the contrary apparently is no longer the law. Raymond v. Chicago Union Traction Co., 207 U. S. 20; Home Tel. & Tel. Co. v. Los Angeles, 227 U. S. 278; Iowa-Des Moines Nat. Bank v. Bennett, 284 U. S. 239, 246. See 40 Harv. L. Rev. 969. The court must have power to decide these preliminary questions in order to reach the ultimate question involving the federal constitution, and it may well place its decision upon such local grounds rather than the federal one if it prefers to avoid a decision of the latter, or even though it does decide it and adversely to the plaintiff. Such, if we understand it, is the ratio decidendi of the Siler case and the others following it where a substan-

tial federal constitutional question is asserted. When, however, the complaint charges the defendant with conduct alleged to violate both a federal statute, such as the trademark or patent act, and also the local law as to unfair competition, the local question is independent of the federal question and is in no sense the foundation of the plaintiff's asserted federal right. Hence if the latter is found not to exist, there is no basis for ascribing to the court a jurisdiction to decide the independent non-federal question. Cf. Tullar & Tullar v. Ill. Central R. R. Co., 213 F. 280, 283 (N. D. Ia.). This we believe to be the distinction between the two lines of cases under discussion. We [fol. 2191] think it is consistent with the actual decisions of the Supreme Court, although no authority has been found which has clearly enunciated it, and it must, indeed, be recognized as scarcely consistent with some of the views expressed in Judge Denison's learned opinion in Vogue Co. v. Vogue Hat Co., 12 F. (2d) 991 (C. C. A. 6). Cf. 40 Harv. L. Rev. 298. In General Investment Co. v. Lake Shore &c. Ry. Co., 260 U. S. 261, there were as here two causes of action, one, under the Anti-Trust laws, the other, under the state law. There was federal jurisdiction over the second because of diverse citizenship. The Supreme Court did not suggest that the jurisdiction over the second rested upon that over the first. Its decision at most goes no further than that a cause of action between diverse citizens would follow into the district court a cause of action arising under laws of the United States when the removal was upon the second ground alone. That is quite another question from the substantive jurisdiction over the second cause of action; moreover, the Supreme Court actually disposed of the second cause of action on the merits, while dismissing the first for lack of jurisdiction. Obviously, therefore, however the second got into the district court, the power to adjudicate upon it could not be ancillary to jurisdiction over the first. Judge Denison, anticipating his view expressed in Vogue Co. v. Vogue Hat Co., supra, did invoke the Siler case, but even then as a dictum, because he thought that federal jurisdiction existed quite independently (269 F. 235, 241), just as the Supreme Court did. The case does not, therefore, stand against our view. It is confirmed, moreover, by the language of Mr.

[fol. 2192] Justice Holmes in Stark Bros. Co. v. Stark, 255 U. S. 50, 51:

"The infringement that is sued for is infringement of a registered trade-mark, not infringement of a trade-mark. That is the plain meaning of the above words and the necessary scope of this suit since that is the scope of the jurisdiction of the District Court. A Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co., 201 U. S. 166, 172. It seems very plain that the plaintiff had a cause of action outside the statute, but that would have to be asserted elsewhere, as the suit was between citizens of the same State. The statute alone gave the right to come into this Court of the United States. Coming in to assert its statutory rights, we will assume in the plaintiff's favor that it could recover for unfair competition that was inseparable from the statutory wrong, but it could not reach back and recover for earlier injuries to rights derived from a different source."

Compare Pittsburg & W. Va. Ry. v. United States, 281 U. S. 479, 488; see also Geneva Furniture Co. v. Karpen, 238 U. S. 254, 259.

In the case at bar the plaintiffs assert two independent causes of action. Primarily they rest jurisdiction upon diversity of citizenship (without, as has been shown, proper allegations or proof thereof) and complain of an alleged illegal boycott as a tortious interference with rights which are not derived from federal statute or constitution; and secondarily, and almost as a make-weight, they allege interference with interstate commerce and apparently assert a right to sue under the federal anti-trust statutes. The additional claim of a violation of constitutional rights is so unsubstantial that no further mention of it is required. Here the non-statutory right primarily relied upon is in no sense the foundation of the right asserted under the federal statute. The two claims are as independent of one another [fol. 2193] as were the statutory trade-mark infringement and the unfair competition in trade which were joined in a single complaint in the Leschen case and similar decisions above discussed. The rule of those cases rather than that of the Siler case should govern.

There is another consideration which might be urged as leading to the same result even if the Siler rule were held

applicable. Concededly the alleged claim of federal jurisdiction must be substantial and not frivolous. Minnesota v. No. Securities Co., 194 U. S. 48. In other words, a plaintiff may not base a claim for relief upon a federal ground which has been authoritatively decided against him, and still demand that the court pass upon other questions of which it would have no jurisdiction except for the claim based on federal constitution or statute. See Bianchi v. Morales, 262 U. S. 170, 172; Niles-Bement-Pond Co. v. Iron Moulders Union, 254 U. S. 77, 82; Colonial Drug & Sales Co. v. Western Products Co., 54 F. (2d) 216, 219 (C. C. A. 10); Wallace Ranch Water Co. v. Rd. Commission, 47 F. (2d) 810 (C. C. A. 9); Postal Tel. Cable Co. v. Nolan, 240 F. 754 (D. Mont.); Silvey v. Commissioners, 273 F. 202, 207 (S. D. Ohio). It may well be doubted whether the plaintiffs' claim under the anti-trust laws could be deemed substantial. They urge that their bill was filed in March 1925 and that the situation must be looked at as of that time rather than in the light of subsequent decisions. See Boston Store v. Am. Graphophone Co., 246 U. S. 8, 26; Mich. Central R. R. Co. v. Vreeland, 227 U. S. 59, 63. We are inclined to believe that the question could not properly be thought doubtful even when the bill was filed, for the effect of an indirect, incidental and remote interference with inter-[fol. 2194] state commerce such as that alleged in the case at bar had already been considered in United Mine Workers v. Coronado Co., 259 U. S. 344, 410 and United Leather Workers v. Herkert, 265 U. S. 457, as was pointed out in the Industrial Association case, 268 U. S. 64, 80; but we do not decide this point nor rest our decision upon it.

For the foregoing reasons we conclude that jurisdiction must depend on diverse citizenship and that while the allegations as to this were sufficient with respect to the individual defendants they were insufficient as to the defendant labor unions. What judgment, then, is this court to render?

Where several plaintiffs sue several defendants in a federal court and jurisdiction rests on diverse citizenship, each plaintiff must be capable of suing each defendant. Strawbridge v. Curtis, 3 Cranch 267. Nor is it material that the plaintiffs need not have sued jointly in a case where they have elected to do so. Peninsular Iron Co. v. Stone, 121 U. S. 631. The same rule is equally applicable

where a plaintiff sues joint and several tort feasors. That he was not compelled to join the defendants whose presence destroys federal jurisdiction does not aid him, unless, as is not the case here, those defendants are merely formal parties. Danks v. Gordon, 272 F. 821 (C. C. A. 2); Matthew v. Coppin, 32 F. (2d) 100 (C. C. A. 9); Wetherby v. Stinson, 62 F. 173 (C. C. A. 7); Pirie v. Tvedt, 115 U. S. 41. If the party improperly joined is not indispensable, the jurisdictional defect may be cured by a motion in the trial [fol. 2195] court to amend and dismiss as to him. Horn v. Lockhart, 17 Wall. 570; Hopkins v. Oxley Stave Co., 83 F. 912 (C. C. A. 8); Mason v. Dullagham, 82 F. 689 (C. C. A. 7); Smith v. Consumers' Cotton-Oil Co., 86 F. 359 (C. C. A. 5); Irving v. Joint District Council, 180 F. 896 (C. C. N. Y.). Such a motion cannot be made in an appellate court. Denny v. Pironi, 141 U. S. 121. Section 274 (c) of the Judicial Code (28 U. S. C. A. Sec. 399) permits correction of the pleadings to conform to the proof, but that does not avail here for it does not appear that in fact the necessary diversity existed. An appellate court must reverse for want of jurisdiction, but may give leave to the trial court to permit correction by amendment of the pleadings. Halsted v. Buster, 119 U. S. 341; Thomas v. Anderson, 223 F. 41 (C. C. A. 8); Watson v. Bonfils, 116 F. 157 (C. C. A. 8); Matthew v. Coppin, supra; Grove v. Grove, 93 F. 865 (C. C. Kans.). Although this court apparently dismissed, in toto in Danks v. Gordon, supra, and Carpenter v. Carden, 294 F. 575 [see also Devost v. Twin State G. & E. Co., 205 F. 349 (C. C. A. 1)], we think this is not necessary here. The district court should have leave to allow the plaintiffs to amend by dismissing as against the locals, or by inserting appropriate allegations to show that none of their members was a citizen of New Jersey or Pennsylvania when the bill was filed, if such be the fact. If the former alternative be adopted, there is authority for allowing the record to stand as already taken, and to enter a decree thereon against the individuals, provided it appears that all the evidence remains equally admissible with the dismissed defendants out. Interstate Refineries, Inc., v. [fols. 2196 & 2196½] Barry, 7 F. (2d) 548, 550 (C. C. A. 8); Atchison T. & S. F. Ry. Co. v. Gilliland, 193 F. 608 (C. C. A. 9); Fitchburg R. Co. v. Nichols, 85 F. 869 (C. C. A. 1); Maddox v. Thorn, 60 F. 217 (C. C. A. 5); Williams v. Great

So. Lumber Co., 13 F. (2d) 246 (E. D. La.), reversed on other grounds in 17 F. (2d) 468, 470 (C. C. A. 5). This is a matter for the district court to determine; as is also the question whether recent legislation by Congress (Public Act No. 65 approved March 23, 1932) has any application to further proceedings in this suit.

Decree reversed with directions to dismiss the complaint without prejudice, for lack of jurisdiction, unless the plaintiffs shall amend to correct the jurisdictional defect.

No costs of appeal awarded either party.

[fol. 2197] In United States Circuit Court of Appeals, Second Circuit

Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon. Thomas W. Swan, Circuit Judges.

Levering & Garrigues Company et al., Plaintiffs-Appellees,

vs.

Paul J. Morrin, Individually, etc., et al., Defendants-Appellants

Decree—Filed Aug. 30, 1932

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, reversed, with directions to dismiss the complaint without prejudice, for lack of jurisdiction, unless the plaintiffs shall amend to correct the jurisdictional defect, without costs of the appeal to either party.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fols. 2198 & 2199] [File endorsement omitted.]

[fol. 2200] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 7, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, limited to the question of Federal jurisdiction other than questions relating to diversity of citizenship.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 2201] SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO RECORD—Filed Feb. 6, 1933

It is stipulated that the record in the above entitled cause consist of the following:

1. Bill of Complaint with Exhibit 1 and Exhibit 2 (excluding the affidavits annexed to the bill).
2. Answer and counterclaim of the defendants.
3. Reply to counterclaim.
4. Order of Reference.
5. Report and decision of the Master.
6. The following statement:

Defendants filed 29 exceptions to the Master's Report, no one of which raised any question as to the jurisdiction of the court. Plaintiffs filed nine exceptions to the Master's Report, the 8th of which reads as follows:

[fol. 2202] "To the finding of the Master that the conduct of defendants did not amount to a conspiracy in restraint of interstate trade or commerce within the meaning of the Statutes of the United States, and that the conduct of the defendants was illegal upon that ground."

7. Final decree of the United States District Court.
8. The following statement:

On March 31, 1930 defendants below took an appeal to the United States Circuit Court of Appeals for the 2nd Circuit and filed 18 assignments of errors, no one of which raised any question as to the jurisdiction of the District Court.

Argument was had in the Circuit Court of Appeals, appellants defendants arguing the case under four heads:

(a) Organization of the International and its relation with other defendants do not constitute an unlawful combination.

(b) The means employed prior to May 1, 1924 are not unlawful.

(c) The means employed by the Union subsequent to May 1, 1924 were lawful under which subhead the defendants contended that:

1. Picketing was lawful.

2. The persuasion of others by means of letters and personal calls to favor firms fair to the defendants was lawful.

3. It was lawful for the International to order its Local No. 52 on strike.

4. It was not unlawful for union workmen to refuse to [fol. 2203] work on jobs on which non-union labor was employed.

(d) The decree violates the rights guaranteed to the defendants by the Constitution of the State of New York and the Fifth and Fourteenth amendments of the Constitution of the United States.

(e) A court of equity will not grant an injunction in a case where no irreparable injury is shown.

Plaintiffs appellees, besides replying to defendants points, argued under their point 6 that: The decree below may be sustained upon the ground that appellants were engaged in a conspiracy in restraint of interstate trade, to which point it devoted six pages of its brief.

The main brief for plaintiffs submitted to the Master in the proceedings before the Master contained as its point 4: "Defendants are engaged in a conspiracy in restraint of interstate commerce and upon this ground an injunction should go", to which eleven pages were devoted; defendants original brief before the Master contained twelve pages upon the subject; plaintiffs brief in reply contained twelve pages on the subject.

The Master held in his report and decision (fols, 6038-6042) that there was no actionable interference with interstate commerce. Upon the argument of the appeal the Circuit Court on its own motion raised the question of its jurisdiction to entertain the cause.

(f) Subsequently a re-argument was ordered limited as to the question as to whether the United States District Court had jurisdiction.

[fols. 2204 & 2205] (g) Upon the re-argument plaintiffs second point was:

"Jurisdiction of the District Court was not invoked solely upon the ground of diversity of citizenship but also upon the ground that the controversy arose under the constitution and laws of the United States (section 24, Judicial Code); (section 41, Title 28, Judicial Code U. S. C. A., subdivision A), and the Court once having acquired jurisdiction upon that ground did not lose jurisdiction because the Federal question was decided adversely to plaintiffs, but properly proceeded to render the proper decree as between the parties, irrespective of the Federal question involved."

9. The opinion of the Circuit Court of Appeals.

10. The mandate of the Circuit Court of Appeals.

11. A statement as follows:

No motion was made to strike the allegations of the bill counting upon an alleged conspiracy in restraint of interstate trade.

Approximately 1800 printed pages of the record in the Circuit Court of Appeals contained testimony and exhibits which had been before the Master, upon which testimony and exhibits he reached a conclusion as upon the facts and law as stated in his report and decision.

McCane, Attorney for Petitioners in Certiorari.
Frank P. Walsh, Attorney for Respondents.

[fol. 2206] [File endorsement omitted.]

Endorsed on cover: File No. 37,120. U. S. Circuit Court of Appeals, Second Circuit. Term No. 423. Levering & Garrigues Company, Hedden Iron Construction Company, McClintic-Marshall Company, et al., petitioners, vs. Paul J. Morrin, individually and as President of International Association of Bridge, Structural and Ornamental Iron Workers, et al. Petition for a writ of certiorari and exhibit thereto. Filed October 3, 1932. File No. 37,120.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 423

LEVERING & GARRIGUES COMPANY, *et als.*,
Petitioners,

against

PAUL J. MORRIN, individually and as President of International Association of Bridge, Structural and Ornamental Iron Workers, *et als.*,
Respondents.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

J. MERRITT LANE,
Attorney for and of Counsel with Petitioners.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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1. The Circuit Court of Appeals erred in holding that the averments with respect to citizenship and residence of the labor associations respondents were not sufficient, and in holding that there is no jurisdiction in the District Court based upon diversity of citizenship where voluntary labor associations are involved unless all of the members of such associations are residents in states other than the states in which the opposite parties have their residences 14

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2. The Circuit Court of Appeals erred in holding that, although the jurisdiction of the District Court was invoked upon the ground that the case was one arising under the laws of the United States, the District Court had no jurisdiction to proceed and determine the case upon the merits under general local or state laws once having determined the federal question against plaintiffs, that question being, however, substantial..... 14

3. The Circuit Court of Appeals erred in not affirming the decree of the District Court instead of remanding the case to that Court and directing that court to dismiss the bill without prejudice unless plaintiffs should be granted leave to amend by alleging that the members of the associations defendants were all residents of states other than those in which plaintiffs reside and by proving such fact if it were denied..... 14

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A. The Circuit Court of Appeals erred in holding that the averments with respect to citizenship and residence of the labor associations respondents were not sufficient, and in holding that there is no jurisdiction in the District Court based on diversity of citizenship where voluntary labor associations are involved unless all of the members of such associations are residents in states other than the states in which the opposite parties have their residences..... 15

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1. Under federal law voluntary labor associations are to be considered residents of the State in which they have their recognized headquarters irrespective of the residence of their members 15

2. If the citizenship and residence of the members of the labor organization is the determining factor, then the allegations of the bill are sufficient, and being admitted by the answer (because not denied) and the jurisdiction being acquiesced in by respondents throughout the case, no question can now be raised as to jurisdiction. The associations are alleged to be citizens and residents of specific states. The answer does not deny the allegation. Hence, under Equity Rule 30 and *Thronateeska Pecan Co.* v. *Matthews,* Circuit Court of Appeals, 5th Circuit, 277 Fed. 361, at page 365, the allegations must be considered as admitted 20

3. The National Association being recognized by the law of Missouri, of which state it is alleged to be a resident, as a legal entity and the locals being recognized by the laws of the State of New York, of which they are alleged to be residents, as legal entities, they are to be treated as legal entities for purposes of federal jurisdiction 20

B. The Circuit Court of Appeals erred in holding that, although the jurisdiction of the District Court was invoked upon the ground that the case was one arising under the laws of the United States, the District Court had no jurisdiction to proceed and determine the case upon the merits under general local or state laws having determined the federal question against plaintiffs, that question being, however, substantial 23

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. .....

LEVERING & GARRIGUES COMPANY, *et als.*,
Petitioners,

vs.

PAUL J. MORRIN, individually and as President of International Associati[illegible] of Bridge, Structural and Ornamental Iron Workers, *et als.*,
Respondents.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

(Italics, etc., mine, except where otherwise noted.)

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Levering & Garrigues, a corporation of New Jersey, McClintic-Marshall Company, a corporation of Pennsylvania, Hedden Iron Construction Company, a corporation of New Jersey, Hay Foundry & Iron Works, a corporation of New Jersey, humbly showeth:

1. Petitioners, all engaged in fabricating steel without the State of New York for the construction of buildings from material brought in from states other than those in which the plants are located, and in selling such fabricated steel F. O. B. New York City for erection therein (fabricated specially for specific buildings), and also in erecting such fabricated steel in New York City, filed their bill of complaint on March 11, 1925, to enjoin respondents, certain individuals, and Paul J. Morrin, individually and as president of International Association of Bridge, Structural and Ornamental Iron Workers and several locals of the International located in New York, from continuing a secondary boycott against plaintiffs, for the purpose of forcing plaintiffs, who had operated open shop since 1906, to abandon that policy and enter into closed union shop agreements with the International and its locals, the effect of which would be that, for practical purposes, the entire building industry in the Metropolitan district would be completely unionized and no non-union workman could secure employment, the industry now being completely unionized with the exception of the erection of structural iron and steel. The charge was one of conspiracy to attain an illegal object and likewise that illegal means were employed, threats, intimidation and the like, to accomplish the success of the boycott (p. 1). The jurisdiction of the court was rested upon: (1) diversity of citizenship; (2) unlawful interference with interstate commerce; (3) violation of constitutional rights of plaintiffs. Upon the filing of the bill temporary restraint went which, after argument, was continued pending final hearing. Initially certain defendants were included, the residence of whom would have defeated the jurisdiction based upon diversity of citizenship, but

they were dismissed, and from that point on no question was raised by respondents as to the jurisdiction of the court based upon that ground.

2. The International was not made a party by its recognized name, but was sued as "Paul J. Morrin, as president of International Association of Bridge, Structural and Ornamental Iron Workers," as permitted by chapter 20 of the General Associations Laws of New York, section 12 (Cahill's Consolidated Laws of New York, 1923, p. 704, article 3, section 12; Cahill's Consolidated Laws of New York, 1930, p. 895; appendix, p. 27). The locals were sued in the form permitted by the laws of New York and also by their recognized names as permitted by the laws of the United States (*United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344, 56 L. Ed. 975, at p. 985). Respondent Paul J. Morrin individually and "as president of International Association of Bridge, Structural and Ornamental Iron Workers" and the locals filed an answer (p. 43), which raised no question as to the jurisdiction of the Court based upon the ground of diversity of citizenship. Paragraph 2 of the answer alleges that Arthur Bolton, who was one of the defendants, was a resident of New Jersey, which is the residence of two of plaintiffs, but he had been dismissed from the suit before the filing of the answer and that matter was out. Respondents likewise filed a counterclaim against plaintiffs (p. 63) appealing to the jurisdiction of the Court for relief upon various grounds (p. 75), some based upon the Federal Anti-Trust Acts, and others upon the common law, with respect to the latter of which the Court could only have jurisdiction if there was diversity of citizenship (unless there was a Federal question).

3. By consent an order of reference was made to a Master (p. 85), who took voluminous testimony (p. 86 to 1673). He filed a voluminous report (p. 1966 to 2017), finding that no constitutional rights of plaintiffs had been violated, and that they were not entitled to relief under the anti-trust acts, but that they had proven their charges of the employment of illegal methods and recommending a decree for an injunction. To this report respondents filed twenty-nine exceptions (p. 2018), no one of which questions the jurisdiction of the Court. On February 14, 1930, a final decree was entered (p. 2037) in pursuance of the Master's report. Respondents appealed to the Circuit Court of Appeals for the Second Circuit, and filed 18 assignments of errors (pp. 2047 to 2164), no one of which questions the jurisdiction of the Court.

4. The appeal was heard by the Circuit Court of Appeals upon the merits and neither in the briefs of counsel nor in the argument was any question raised as to the jurisdiction of the Court. The Court directed a reargument upon the question as to whether the allegations of the bill, admitted by the answer, were sufficient to indicate diversity of citizenship. The case was reargued and plaintiffs contended: (1) that the allegations of the bill were sufficient; (2) that, irrespective of diversity of citizenship, the Court had jurisdiction because of the charge in the bill that respondents were engaged in a conspiracy in restraint of trade (p. 19, par. 18), and that, although the Federal question was decided adversely to plaintiffs, the District Court did not lose jurisdiction and might proceed to final decree upon the other issues made by the pleadings. The Circuit Court of Appeals handed down a decision on August 30, 1932 (p. 2181) (not yet reported) holding that the allega-

tions of the bill as to the residence of the Unions were not sufficient and that the case was not one in which the rule of *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, at page 191, 53 L. Ed. 753, at page 757, should be applied, and remanded the case to the United States District Court with leave to that Court to allow plaintiffs to amend by dismissing as against the Locals or by inserting appropriate allegations to show that no one of their members was a citizen of New Jersey or Pennsylvania when the bill was filed and if that were not done, then to dismiss the complaint without prejudice for lack of jurisdiction.

5. The averments with respect to the residences of the International and the Locals are as follows (p. 3):

"Defendant Paul J. Morrin is a resident, citizen and inhabitant of the State of Missouri. Defendant International Association of Bridge, Structural and Ornamental Iron Workers is a voluntary labor organization and is a resident, citizen and inhabitant of the State of Missouri."

Each of the Locals against which the decree went is alleged to be a subsidiary of the International and a resident, citizen and inhabitant of the State of New York and furthermore two of the Locals involved are alleged to have their headquarters in New York and the other is alleged to have jurisdiction over stone derrickmen in New York.

The allegations of the bill with respect to the citizenship and residence of these defendants were not denied in the answer (pars. 2, 3 and 4, p. 44) and the effect of the failure to deny is an admission. *Thronateeska Pecan Co.* v. *Matthews,* Circuit Court of Appeals, 5th Circuit, 277 Fed. 361; new Equity Rule No. 30.

Notwithstanding the decision of this Court in *United Mine Workers of America* v. *Coronado Coal Co.,* 259 U. S. 344, 66 L. Ed. 975, at p. 984, to the effect that labor unions

might be sued in the Federal Court in equity by their recognized names and that it is not necessary to make the individual members parties, the Circuit Court of Appeals held that the District Court had no jurisdiction based upon diversity of citizenship unless it was specifically alleged that each of the individual members of the labor organizations had his residence in a State other than that of plaintiffs, the effect of which is that international labor organizations can neither sue nor be sued in the Federal Court, if the jurisdiction is rested solely upon diversity of citizenship, nor can local labor organizations if by chance one of their members happens to reside in the place of residence of a plaintiff or defendant as the case may be, which is precisely the situation which led this Court, in 1853, to finally determine in *Marshall* v. *Baltimore & Ohio Railroad Co.*, 16 How. 314, 14 L. Ed. 953, that, for purposes of federal jurisdiction, a corporation is a citizen of the State of incorporation, although this Court had previously held that a corporation could not be sued in the Federal Court where the jurisdiction rested solely upon diversity of citizenship. *Strawbridge* v. *Curtis*, 3 Cranch. 267, 2 L. Ed. 435 (1806); *Hope Insurance Co.* v. *Boardman*, 5 Cranch. 57, 3 L. Ed. 36 (1809); *Bank of U. S.* v. *Deveaux*, 5 Cranch. 61, 3 L. Ed. 38 (1809).

The change in the attitude of this Court is indicated by *Sullivan* v. *Fulton Steamship Co.*, 6 Wheat. 450, 5 L. Ed. 302 (1821); *Commercial & R. Bank* v. *Slocomb*, 14 Peters 60, 10 L. Ed. 354 (1840); *Louisville, Cincinnati & Charleston R. R. Co.* v. *Letson*, 2 How. 497; 11 L. Ed. 353 (1844).

6. The Circuit Court of Appeals stated that this Court had not yet passed upon the precise issue but that the decisions in *Chapman* v. *Barney*, 129 U. S. 677, 32 L. Ed.

800 (1888), involving a joint stock company, and *Great Southern Fireproof Hotel Co.* v. *Jones,* 177 U. S. 449, 44 L. Ed. 842 (1899), involving a limited partnership association, and *Thomas* v. *Board of Trustees,* 195 U. S. 207, 49 L. Ed. 160 (1904), involving a board of trustees, were strongly persuasive against the contention of plaintiffs that, for purposes of federal jurisdiction, it should be conclusively presumed that all of the members of a labor organization were residents of the state in which it had its recognized headquarters, precisely the same as it is conclusively presumed that the stockholders of a corporation have their residence in the State of incorporation and for the same reason, and, if that were not so, then still federal jurisdiction, based upon diversity of citizenship, could be sustained upon the theory of Mr. Justice Wayne in *Louisville, Cincinnati & Charleston R. R. Co.* v. *Letson,* 2 How. 497, 11 L. Ed. 353 (1844), at p. 376, which was to the effect that, even if it be considered that *all* the stockholders were not residents of the State of incorporation nevertheless if *some* of them were (that State being a different one from that of the residence of the opposite party) the jurisdiction was not defeated for the stockholders who had their residence in the State of the opposite party could be alone included as parties.

The Circuit Court of Appeals for the Second Circuit had considered the subject in *Ex Parte* Edelstein, 30 Fed. (2d) 636, certiorari denied, 279 U. S. 851 (1929), 73 L. Ed. 994, and two of the Judges had reached the same conclusion as arrived at by the Court in this case with a strong dissenting opinion by Manton, Judge, to which I respectfully refer, 30 Fed. (2d) 638.

7. The Circuit Court of Appeals further held that the conduct of respondents did not constitute a conspiracy to illegally restrain interstate trade within the meaning of the Anti-Trust and Federal Trade Commission Acts and the decisions of this Court in *Bedford Cut Stone Co.* v. *Journeymens S. C. Ass'n.*, 274 U. S. 38, 71 L. Ed. 916; *Duplex Printing Co.* v. *Deering*, 254 U. S. 443, 65 L. Ed. 349, 16 A. L. R. 196; *Loewe* v. *Lawlor*, 208 U. S. 274, 52 L. Ed. 488; *United States* v. *Brims*, 272 U. S. 549, 71 L. Ed. 403; holding rather that the case was governed by *Industrial Assn. of San Francisco* v. *United States*, 268 U. S. 64, 69 L. Ed. 849; *United Leather Workers Int. Union* v. *Herket & Maisel Trunk Co.*, 265 U. S. 457, 68 L. Ed. 1104. The Court did *not* hold that the claims of petitioner under the Anti-Trust and Federal Trade Commission Act were frivolous although *intimating* that it was inclined to believe that the question could not properly be thought doubtful even when the bill was filed March 11, 1925, but expressly stating that it did not decide the point nor rest its decision upon it (pp. 2192, 2193).

In the District Court the original brief of petitioners submitted to the Master consisted of some 11 pages, respondents' original brief, 12 pages, petitioners' brief in reply, 12 pages, and respondents' brief in reply, 10 pages, and plaintiffs' brief in reply, 21 pages, and the Master considered the federal question upon the merits (p. 2013). The federal question was never abandoned by plaintiffs and was urged upon the argument of the appeal upon the merits, that is to say, plaintiffs argued that, even if the Master were wrong in finding that respondents were guilty of illegal acts violating plaintiffs' common law rights, still the decree was right because the Master should have held

that the conduct of respondents was in violation of the Anti-Trust and Federal Trade Commission Acts. It was contended by plaintiffs that even if the Master was right in holding that the conduct of respondents did not come within the condemnation of the Anti-Trust and Federal Trade Commission Acts, nevertheless a substantial federal question having been presented, at least as of the date of the filing of the bill which is the date to be considered (*Michigan C. R. Co.* vs. *Vreeland*, 227 U. S. 59, 57 L. Ed. 417), the jurisdiction of the Federal Court attached and it was bound, or at least privileged, to decide all questions involved in the case even if not raising a federal question under the authority of *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, 53 L. Ed. 753, approved *Louisville & N. R. Co.* v. *Garrett*, 231 U. S. 298, 58 L. Ed. 229, at p. 239; *Chicago and Great Western R. R. Co.* v. *Kendall*, 266 U. S. 94, 69 L. Ed. 183, at p. 188; *Pacific Electric R. Co.* v. *Los Angeles*, 194 U. S. 112, 48 L. Ed. 896, at p. 897; *Binderup* v. *Pathé Exchange*, 263 U. S. 291, 68 L. Ed. 308, at p. 314.

8. The Circuit Court of Appeals recognized the authority of *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, at p. 191, 53 L. Ed. 753, to the effect that, if there was a claim as to the invalidity of a State statute because in violation of the Federal constitution, notwithstanding the fact that the Court held ultimately adversely upon the Federal question, nevertheless, it had jurisdiction and might decide the merits of the case upon other grounds, but it said that the principle was not of universal application referring to the line of cases represented by *Elgin Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665, 677, 45 L. Ed. 365, and then, after adverting to the fact that there was no decision of this Court to point out the line of differentiation, the Circuit Court of Appeals

attempted to harmonize the two lines of cases "as best we may" and reached the conclusion, as I understand it, that it is only when it is *necessary* to decide the non-federal question in order to determine the merits of the federal question that the rule of *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, 53 L. Ed. 757, applies, which view has never been expressed by this Court as conceded by the Circuit Court of Appeals, that Court stating (p. 2190):

> "We think it (the differentiation) is consistent with the actual decisions of the Supreme Court, although no authority has been found which has clearly enunciated it, and it must, indeed, be recognized as scarcely consistent with some of the views expressed in Judge Denison's learned opinion in Vogue Co. *v.* Vogue Hat Co., 12 F. (2d) 991 (C. C. A. 6)."

9. This writ is applied for because of the following reasons:

a. The Circuit Court of Appeals in its determination that the allegations with respect to citizenship and residence of the Union associations were not sufficient to confer jurisdiction upon the federal court based upon diversity of citizenship decided an important point of federal law which has not been, but should be, settled by this Court and in a manner probably in conflict with applicable decisions of this court, the question, at this day, being just as important as was the question as to whether a corporation could sue or be sued in the federal courts, the jurisdiction being based solely upon diversity of citizenship.

b. The Circuit Court of Appeals in its determination that, notwithstanding that the jurisdiction of the federal court was invoked upon the ground that there

was a substantial question involved arising under the laws of the United States, the District Court having decided adversely to the plaintiffs as to the federal question, could not proceed to determine the merits of the case arising under general and local and state laws, cut down the effect of this court's determination in *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, at p. 191, 53 L. Ed., at 757, in a manner probably in conflict with the applicable decisions of this court, and in direct conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Vogue Co.* v. *Vogue Hat Co.*, 12 Fed. (2d) 991, in which latter case the Circuit Court of Appeals for the Sixth Circuit said that *its* views were in conflict with the decision of the Second Circuit Court of Appeals in *Bernstein* v. *Danwitz*, 190 Fed. 604, 605. *General Investment Co.* v. *Lakeshore and Railway Co.*, 269 Fed. 235, another decision of the Sixth Circuit Court of Appeals, in which, at p. 241, the Court expressed the same views as in the later case of *Vogue Co.* v. *Vogue Hat Co.*, 12 Fed. (2d) 991, came to this court in 260 U. S. 261, 67 L. Ed. 244 and this court affirmed, with modification, not important here, and there was no criticism in the opinion of this court of the language of the Circuit Court of Appeals for the Sixth Circuit as to the effect of this court's decision in *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, 53 L. Ed. 753. The Second Circuit Court of Appeals (conceded by itself) is in irreconcilable conflict with the Sixth Circuit Court of Appeals as to the effect of this court's decision in the case last cited.

10. Although the record in this case consists of upwards of 2100 pages, if this Court should award a writ of certiorari, limited to a discussion of the matter mentioned in subdivision A, paragraph 9 hereof, all of the pertinent facts could be submitted to this Court in a record which

would not exceed twenty-five pages, and I believe that if the certiorari be allowed and a review of both the matters involved in paragraphs a and b be permitted, the record could be confined to one not exceeding fifty pages, and perhaps considerably less.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may issue out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said court to certify and send to this court on a day certain to be therein designated a full and complete transcript of the record of all proceedings of the said United States Circuit Court of Appeals for the Second Circuit and of the District Court of the United States for the Southern District of New York and all proceedings in both courts (or such parts of such record as this court may direct), to the end that the said case may be reviewed and determined by this court as provided by law, and that your petitioners may have such other and further relief or remedy in the premises as to this court may seem appropriate and that the said decree of the United States Circuit Court of Appeals for the Second Circuit be set aside and that the decree of the United States District Court for the Southern District of New York be affirmed.

And your petitioners will ever pray.

MERRITT LANE,
Attorney for and of Counsel with
Petitioners.

BRIEF IN SUPPORT OF APPLICATION FOR CERTIORARI.

I.

The Opinions of the Courts Below.

There was no opinion of the United States District Court for the Southern District of New York. The Court made its decree upon the report and decision of a Master printed in the record (p. 1966), not reported. The decree of the United States District Court is printed (p. 2037 of the record).

The opinion of the Circuit Court of Appeals for the Second Circuit is printed (p. 2181) and is not reported.

II.

Jurisdiction.

The jurisdiction of this Court is rested on Section 240 of the Judicial Code as amended by the Act of February 13, 1925, ch. 229, Sec. 1, 43 Statutes 938; Sec. 347, U. S. C. A., p. 359, Title 28, subdivision A of said Section.

III.

The grounds upon which the jurisdiction of this Court is invoked.

The grounds upon which the jurisdiction of this Court is invoked are set forth fully in paragraph 9 of the petition, page 10.

IV.

Statement of the Case.

The case is fully stated in the petition (paragraphs 1 to 7, pp. 1 to 8).

V.

Specifications of Error.

1. The Circuit Court of Appeals erred in holding that the averments with respect to citizenship and residence of the labor associations respondents were not sufficient, and in holding that there is no jurisdiction in the District Court based upon diversity of citizenship where voluntary labor associations are involved unless all of the members of such associations are residents in states other than the states in which the opposite parties have their residences.

2. The Circuit Court of Appeals erred in holding that, although the jurisdiction of the District Court was invoked upon the ground that the case was one arising under the laws of the United States, the District Court had no jurisdiction to proceed and determine the case upon the merits under general local or state laws once having determined the federal question against plaintiffs, that question being, however, substantial.

3. The Circuit Court of Appeals erred in not affirming the decree of the District Court instead of remanding the case to that Court and directing that Court to dismiss the bill without prejudice unless plaintiffs should be granted leave to amend by alleging that the members of the asso-

ciations defendants were all residents of states other than those in which plaintiffs reside and by proving such fact if it were denied.

ARGUMENT.

A.

The Circuit Court of Appeals erred in holding that the averments with respect to citizenship and residence of the labor associations respondents were not sufficient, and in holding that there is no jurisdiction in the District Court based on diversity of citizenship where voluntary labor associations are involved unless all of the members of such associations are residents in states other than the states in which the opposite parties have their residences.

Much of the argument under this point has been indicated, necessarily, in the petition in stating the decision of the Circuit Court of Appeals (pars. 5, 6, pp. 5 to 7).

1.

Under federal law voluntary labor associations are to be considered residents of the State in which they have their recognized headquarters irrespective of the residence of their members.

This Court decided in *Strawbridge* v. *Curtis,* 3 Cranch. 267, 2 L. Ed. 435 (1806); *Hope Insurance Co.* v. *Boardman,* 5 Cranch. 57, 3 L. Ed. 36 (1809); *Bank of U. S.* v. *Deveaux,* 5 Cranch. 61, 3 L. Ed. 38 (1809), that a corporation could neither sue nor be sued in the Federal Court (the jurisdiction resting on diversity of citizenship) because it could not be considered a citizen. There then followed *Sullivan* v. *Fulton Steamship Co.,* 6 Wheat. 450, 5 L. Ed. 302 (1821),

and *Commercial & R. Bank* v. *Slocomb,* 14 Peters 60, 10 L. Ed. 354 (1840). In 1844 Mr. Justice Wayne, writing for this Court in *Louisville, Cincinnati & Charleston R. R. Co.* v. *Letson,* 2 How. 497, 11 L. Ed. 353, said that a corporation was, for the purposes of jurisdiction, a citizen of the state "by which it was created and where its business is done by any of the corporators who are chosen to manage its affairs" and that, although the corporators as individuals were not defendants to the suit, they were parties having an interest in the result and if some of them were citizens of the state in which the suit was brought, jurisdiction attaches over the corporation and was not defeated by the fact that some of the members resided in a different state.

This Court, finally, in *Marshall* v. *Baltimore & Ohio R. R. Co.,* 16 How. 314, 14 L. Ed. 953 (1853), reviewed the entire matter and held, as I understand the opinion of Mr. Justice Grier, that, while the corporate intangible entity could not in a true sense have citizenship, nevertheless it took to itself the citizenship of its corporators, the corporators acting in unison and that, although the corporators might be citizens of different states, for purposes of jurisdiction over the corporation, they were estopped to deny but that they were residents of the state of incorporation. The basis of the decision of this Court was *practical necessity* and, in the light of present day conditions and of the opinions of this Court subsequently to be mentioned with respect to labor unions, every word of the opinion of Mr. Justice Grier in *Marshall* v. *Baltimore & Ohio R. R. Co.,* 16 How. 314, 14 L. Ed. 953, at p. 958, *et seq.,* will be found to be applicable to labor organizations and associations of similar type.

In *Gompers Case,* 221 U. S. 418, 439, 55 L. Ed. 797, 805, this Court pointed out that labor unions were substantially in a class by themselves.

And, finally, in *United Mine Workers of America* v. *Coronado Coal Co.,* 259 U. S. 344, 66 L. Ed. 975, at page 984, this Court held that, although at common law an unincorporated association of persons was not recognized as having any other character than a partnership and could only sue or be sued in the name of its members the growth and necessities "of these great labor organizations have brought affirmative legal recognition of their existence and usefulness and provisions for their protection which their members have found necessary," and that they had been recognized in fact as legal entities and that they might sue and be sued in their recognized name "out of the very necessities of the existing conditions and the utter impossibility of doing justice otherwise." This Court pointed out that legislation had recognized them as legal entities.

This Court, as one of its reasons for holding that a labor union might be sued in its own name, said that to remand persons injured to a suit against each of the 400,000 members to recover damages and to levy on its share of the strike fund would be to leave them remediless. But now the Circuit Court of Appeals holds that, notwithstanding the fact that the labor union may be sued in its own name, it is necessary to allege and prove the residences of the "400,000 members."

Judge Rose, in his Third Edition, Federal Jurisdiction and Procedure, secs. 279 and 276, while conceding that it had been held in at least one case that the citizenship of the members must be alleged said: "But the reasoning of the Supreme Court in the Coronado case would appar-

ently point to an opposite conclusion, although as diversity of citizenship was not the ground of jurisdiction there relied on, this precise question was not discussed and may not have been considered."

Judge Lindsley, in *Russell* v. *Central Labor Union*, 1 Fed. (2d) 412, at page 414, in which the argument was made that the logical consequence of the decision of this Court in *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344, 66 L. Ed. 975, was that the citizenship and residence of the individual members of a labor organization need not be alleged, said that the reasoning "is not without force but such positive modification of the law should be made by the Supreme Court."

Judge Manton, of the Circuit Court of Appeals for the Second Circuit, in a well considered dissenting opinion in *Ex Parte Edelstein*, 30 Fed. (2d) 636, said that the citizenship and residence of the members need not be alleged.

In *Chapman* v. *Barney*, 129 U. S. 677, 32 L. Ed. 800, this Court held that, although a limited partnership association might sue or be sued in the name of its president under state law, it could not so sue or be sued in the Federal Court. But the effect of that decision, so far as voluntary labor associations are concerned, is overthrown, submit, by the decision of this Court in *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, 66 L. Ed. 975, to the effect that, even without the aid of statutes, labor organizations may sue and be sued in the name of the association. In *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449, 44 L. Ed. 842, this Court held that, although a limited partnership association created under the Pennsylvania statute might be described as a *quasi* corporation, it could not be regarded as a corporation for purposes of federal

jurisdiction. In *Thomas* v. *The Board of Trustees,* 195 U. S. 207, 49 L. Ed. 160, at page 165, this Court said that, for jurisdictional purposes the citizenship and residences of the individual members of the board of trustees was controlling.

But these cases all involved a strictly limited number of individuals and they were all decided before *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344, 66 L. Ed. 975, and this Court, notwithstanding them, had no difficulty in holding in *United States* v. *Adams Express Co.,* 229 U. S. 381, 57 L. Ed. 1237, that a voluntary association might be indicted and punished as an entity under a federal statute.

Since the decision of the *Coronado* case many suits have been brought against labor unions in the Federal Courts, the jurisdiction being based upon diversity of citizenship, without alleging the citizenship or residence of the individual members, one of which at least came to this Court and was decided on the merits (so far as the matter now involved is concerned) without any question being raised as to the jurisdiction of the Court. *Barker Painting Co.* v. *Local No. 734, Brotherhood of Painters, Paperhangers and Decorators of America,* 281 U. S. 462, 74 L. Ed. 967.

It is true that in that case the National Brotherhood made a party was stated in its answer to be a corporation, but the locals were mere voluntary associations. The allegations in the bill both with respect to the national body and the locals as to citizenship and residence were precisely the same as the similar allegations in the case at bar. The case was considered upon its merits (so far as the matter now under discussion is concerned) in all the courts, 12 Fed. (2d) 945, 34 Fed. (2d) 3, 280 U. S. 550, 74 L. Ed. 608, 281 U. S. 462, 74 L. Ed. 967. At no stage of the proceed-

ings was the objection made which the Circuit Court of Appeals for the Second Circuit has raised in the case at bar *ex mero motu.*

2.

If the citizenship and residence of the members of the labor organization is the determining factor, then the allegations of the bill are sufficient, and being admitted by the answer (because not denied) and the jurisdiction being acquiesced in by respondents throughout the case, no question can now be raised as to jurisdiction. The associations are alleged to be citizens and residents of specific states. The answer does not deny the allegation. Hence, under Equity Rule 30 and *Thronateeska Pecan Co.* v. *Matthews,* Circuit Court of Appeals, 5th Circuit, 277 Fed. 361 at page 365, the allegations must be considered as admitted.

Not only did respondents, by failing to answer, admit these allegations but they filed a counterclaim for relief with respect to part of which the Court could only have jurisdiction upon the ground of diversity of citizenship.

Under the circumstances, we submit, assuming that the citizenship and residence of the members of the association is the determining factor, respondents must be considered as having admitted the requisite citizenship and residence of the members by their conduct in not questioning the sufficiency of the allegations and in acquiescing throughout the case both in the truth of the allegations and in the fact of jurisdiction in the Court.

3.

The National Association being recognized by the law of Missouri, of which state it is alleged to be a resident, as a legal entity and the locals being recog-

nized by the laws of the State of New York, of which they are alleged to be residents, as legal entities, they are to be treated as legal entities for purposes of federal jurisdiction.

By the Laws of Missouri, Missouri Statutes Annotated, c. 32, sec. 4526, p. 1983; revised statutes 1919, sec. 9722 (Appendix, p. 29), and by the decisions of that State, St. Louis Court of Appeals. *Syz* v. *Milk Wagon Drivers Local 603* (not officially reported), 24 S. W. 2d Series 1080, 1082; *Wiehuechter* v. *Miller*, 208 S. W. 39, 276 Mo. 322, associations such as labor unions are treated as corporations for purposes of litigation and jurisdiction. And so also by the laws of New York, Constitution of New York, Article 8, Sec. 3, Cahill's Consolidated Laws of N. Y. 1923, p. 22; 1930, p. 20; secs. 12, 13, 16, Article 3, c. 20 of the General Association Laws of New York; Cahill's Consolidated Laws of N. Y. 1923, p. 705, 1930, p. 895 (Appendix, pp. 27, 28). Notwithstanding that this Court said, in *Chapman* v. *Barney*, 129 U. S. 677, 32 L. Ed. 800 (1889) that, although a voluntary association might be authorized by the laws of the State of New York to bring suit in the name of its president, that fact could not give the company power, by that name, to sue in the Federal Court, Mr. Justice Holmes, in delivering the opinion of this Court in *United States* v. *Adams Express Co.*, 229 U. S. 381, 57 L. Ed. 1237 (1913) holding that the Express Co., although a voluntary association, might as an association be indicted and punished, relied upon the fact that the constitution and laws of New York recognized the association as an entity and, in the course of his opinion, he said: "We refer to it simply to show the semi-corporate standing that these companies already had locally as well as in the popular minds * * *."

And Judge Rose, in his Third Edition Federal Jurisdiction and Procedure, secs. 275 and 276, p. 262, commenting upon new Equity Rule 37, says: "Possibly, under this rule, it will be held that on the equity side a suit may hereafter be maintained by some one authorized by state statute to sue on behalf of a joint stock company or limited partnership *providing the citizenship of such plaintiff be different from that of any of the defendants.* The rule may be construed to make the citizenship of the person for whom he sues immaterial."

The unions other than the International in this case were sued not only by their recognized names but also in the method provided by the state's statute, to wit, in the name of their presidents.

In *Duplex Printing Press Co.* v. *Deering* (254 U. S. 443; 65 L. Ed. 349) the unions were sued in the name of their Presidents as permitted by the laws of New York and no question was raised but that the union as such were parties, this Court so holding relying upon equity rule 38. In the case at bar, counsel answering for Paul J. Morrin as President of the International, appeared for the International and the Circuit Court of Appeals fell into error when it said (p. 2184) "that the International itself was not made a party." The jurisdiction in the *Duplex* case was based upon the Anti-Trust Acts.

I submit that if it be the fact that these great labor organizations, possessing the powers which this Court has in many cases adverted to, endowed both by Congress and by state legislatures with powers equivalent to those of any corporation, and recognized throughout the land as legal entities, can escape the jurisdiction of the federal courts in any case based upon diversity of citizenship by having

a member resident in each of the states of the union, it should be authoritatively so determined.

The matter is not one which may be corrected by act of Congress. The decision rests upon a construction of the Constitution of the United States and can only be determined in the last analysis by this Court.

B.

The Circuit Court of Appeals erred in holding that, although the jurisdiction of the District Court was invoked upon the ground that the case was one arising under the laws of the United States, the District Court had no jurisdiction to proceed and determine the case upon the merits under general, local or state laws having determined the federal question against plaintiffs, that question being, however, substantial.

I have rather fully set forth (paragraphs 7, 8, p. 8) of the petition the line of argument upon this phase of the case so far as I deem appropriate upon this application.

The conflicting opinions of the Circuit Court of Appeals for the Sixth and Second Circuits: *Vogue Co.* v. *Vogue Hat Co.*, 12 Fed. (2d) 991 (6th); *General Investment Co.* v. *Lake Shore and M. S. R. R. Co.*, 269 Fed. 235, at page 241 (6th); *Bernstein* v. *Danwitz*, 190 Fed. 604 (2d); and the case at bar, indicate beyond question that one or the other Circuit Courts of Appeal has misapprehended the scope of this Court's decision in *Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175, at page 191, 53 L. Ed. 753, reaffirmed by this Court as lately as *Chicago Great Western R. R. Co.* v. *Kendall*, 266 U. S. 94, 69 L. Ed. 183, page 188.

The manner in which the Circuit Court of Appeals for the Second Circuit attempts to harmonize *Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175, at page 191,

53 L. Ed. 753, and the cases following it with what it conceives to be a limitation upon the rule of that case illustrated by *Elgin Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665, 677, 45 L. Ed. 365, really results in giving no effect whatever to what this Court said in the Siler case, for, as I understand the opinion of the Circuit Court of Appeals, it is to the effect that only where it is necessary for the Federal Court to determine the local question first so that it may be able to reach a conclusion as to the ultimate question involving the federal constitution or statutes, does the District Court have power to determine the local question, which certainly is not the conception either of the bar or of the Sixth Circuit Court of Appeals of what this Court held in the Siler case. I do not think that it has ever been questioned but that the Federal District Court had the power to determine the local question if it were necessary so to do to determine the federal matter. What *was* questioned was whether, if jurisdiction was based upon the ground that the case arose under the Constitution and the laws of the United States, that federal question being substantial, the Court having determined that question against the plaintiffs, the Court could then proceed and determine the case upon its merits according to local law, and I submit that *that* was the question which was answered in the affirmative by this Court in the Siler case.

It is suggested by the Circuit Court of Appeals that at the time this bill was filed, March, 1925, which is the important date (see *Michigan C. R. Co.* v. *Vreeland*, 227 U. S. 59, 57 L. Ed. 417 (1913); *Boston Store* v. *American Graphophone Co.*, 246 U. S. 8, 62 L. Ed. 551 (1918), the federal question was not doubtful. But it expressly declined to decide the point or to rest its decision upon it. The Circuit

Court of Appeals mentioned *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, 66 L. Ed. 975; *United Leather Workers Int. Union* v. *Herket & Maisel Trunk Co.*, 265 U. S. 457, 68 L. Ed. 1104, as having been decided at that time. But likewise, this Court had decided *Bedford Cut Stone Co.* v. *Journeymen S. C. Ass'n*, 274 U. S. 37, 71 L. Ed. 916; *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 68 L. Ed. 308; *Ramsey* v. *Associated Bill Posters*, 260 U. S. 501, 67 L. Ed. 368.

The Circuit Court of Appeals referred to its decision in *Aeolian Co.* v. *Fisher*, 29 Fed. (2d) 679 (1928), in which case, by a divided Court, it affirmed the District Court in denying a motion for a temporary injunction, but when the case came to the Circuit Court of Appeals again on the refusal of the District Court to grant a permanent injunction, 35 Fed. (2d) 34, it reversed the District Court, 40 Fed. (2d) 190. The decisions of the Circuit Court of Appeals in the Aeolian case illustrate better than anything else could, perhaps, that the claim of plaintiffs under the Anti-Trust and Federal Trade Commission Acts, considered as of 1925 was at least substantial and I urge now that the Master and the Circuit Court of Appeals erred in holding that respondents were not involved in a conspiracy to restrain interstate trade. It is only when the claim is so unsubstantial as that it would be forthwith stricken that it can be deemed so unsubstantial as to be frivolous or, in other words, plainly without color of merit (see *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 68 L. Ed. 308, at p. 314) as that federal jurisdiction cannot be maintained upon the allegations contained in the bill. No motion to strike was made in the case at bar. The matter was urged and fully briefed in the District Court and again in the Circuit Court

of Appeals and the Master determined it upon its merits against plaintiffs, and I think erroneously.

The Circuit Court of Appeals for the Second Circuit refers to the fact that there was no motive on respondents' part to interfere with interstate commerce. As to this suggestion *International Organization* v. *Red Jacket C. C. Co.*, 18 Fed. (2d) 839; *United States* v. *Reading*, 226 U. S. 324, 57 L. Ed. 243, holding that, where the necessary results of the acts performed pursuant to or contemplated by the conspiracy is to restrain trade between the states, the intent is presumed, supply the answer.

I submit that, upon the merits, the case is within *Bedford Cut Stone Co.* v. *Journeymen S. C. Ass'n*, 274 U. S. 37, 71 L. Ed. 916, and *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 65 L. Ed. 349. But however that may be, it can hardly be said that the allegations with respect to interstate commerce were so frivolous as to be without color.

Not only did plaintiffs fabricate this steel for erection by themselves in New York but they fabricated it for sale to others F. O. B. New York for erection by them and the steel was specially fabricated in the plants of plaintiffs for specific buildings and the raw materials going into the steel came from still other states. The effect on interstate commerce was just as direct as was the effect of the conduct of the defendants in *Bedford Cut Stone Co.* v. *Journeymen S. C. Ass'n*, 274 U. S. 37, 71 L. Ed. 916.

It is respectfully submitted that this case is one calling for the exercise by this Court of supervisory powers and that a writ of certiorari should be granted.

MERRITT LANE,
Attorney for and of Counsel with
Petitioners.

Appendix.

Cahill's Consolidated Laws of New York, 1930, page 895, Article III, secs. 12, 13 and 16:

"Sec. 12. Action or proceeding by unincorporated association. An action or special proceeding may be maintained by the president or treasurer of an unincorporated association, consisting of seven or more persons, to recover any property, or upon any cause of action, for or upon which all the associates may maintain such an action or special proceeding, by reason of their interest or ownership therein, either jointly or in common. An action may likewise be maintained by such president or treasurer to recover from one or more members of such association his or their proportionate share of any moneys lawfully expended by such association for the benefit of such associates, or to enforce any lawful claim of such association against such member or members. (Added by L. 1920, ch. 915, April 15, 1921.)"

"Sec. 13. Action or proceeding against unincorporated association. An action or special proceeding may be maintained, against the president or treasurer of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or severally. Any partnership, or other company of persons, which has a president or treasurer is deemed an association within the meaning of this section. (Added by L. 1920, ch. 915, April 15, 1921.)"

"Sec. 16. Subsequent action against members. Where an action has been brought against an officer, or a counterclaim has been made, in an action brought by an officer, as prescribed in this article, another action, for the same cause, shall not be brought against the members of the association, or any of them, until after final judgment in the first action, and the return, wholly or partly unsatisfied or unexecuted, of an execution issued thereupon. After such a return, the party in whose favor the execution was issued, may maintain an action, as follows:

1. Where he was the plaintiff, or a defendant recovering upon a counterclaim, he may maintain an action against the members of the association, or, in a proper case, against any of them, as if the first action had not been brought, or the counterclaim had not been made, as the case requires; and he may recover therein, as part of his damages, the costs of the first action, or so much thereof, as the sum collected by virtue of the execution, was insufficient to satisfy.

2. Where he was a defendant, and the case is not within subdivision first of this section, he may maintain an action, to recover the sum remaining uncollected, against the persons who composed the association, when the action against him was commenced, or the survivors of them.

But this section does not affect the right of the person, in whose favor the judgment in the first action was rendered, to enforce a bond or undertaking, given in the course of the proceedings therein. Section eleven of this chapter applies to an action brought, as prescribed in this section against the members of any association, which keeps a book for the entry of changes in the membership of the association, or the ownership of its property; and to each book so kept. (Added by L. 1920, ch. 915, April 15, 1921.)"

Constitution of New York, Article VIII, sec. 3, Cahill's Consolidated Laws of New York, 1923, page 22, 1930, page 20:

> "Corporation, definition of term—sec. 3. The term corporations as sued in this article shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships. And all corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons."

Missouri Statutes Ann., C. 32, Sec. 4526, p. 1983, Rev. Stat., 1919, Sec. 9722, Corp.— *term defined:*

> "The term 'corp.' as used in this chapter, shall be construed to include all joint stock companies or associations having any powers or privileges not possessed by individuals or partnerships."

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FEB 16 1
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 423.

LEVERING & GARRIGUES COMPANY, *et als.*,
Petitioners,

vs.

PAUL J. MORRIN, individually and as President of International Association of Bridge, Structural and Ornamental Iron Workers, *et als.*,
Respondents.

BRIEF FOR PETITIONERS.

MERRITT LANE,
Of Counsel, Petitioners.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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IN THE

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OCTOBER TERM, 1932.

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LEVERING & GARRIGUES COMPANY, *et als.*,
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PAUL J. MORRIN, individually and as President of International Association of Bridge, Structural and Ornamental Iron Workers, *et als.*,
Respondents.

BRIEF FOR PETITIONERS.

(Italics, etc., mine, except where otherwise noted.)

I.

The Opinions Below.

This case is here on certiorari granted November 7, 1932 (U. S. Supreme Court Advance Opinions, No. 2, p. 117, 77 L. Ed. 117, 53 Sup. Ct. 118), to review a decree of the Circuit Court of Appeals for the 2nd Circuit filed August 30, 1932, page 110, reversing a decree of the United States District Court for the Southern District of New York made February 14, 1930, page 96, affirming a report of a Master

dated October 30, 1929, page 57, which decree of the Circuit Court of Appeals remanded the case to the District Court "with directions to dismiss the bill of complaint without prejudice, for lack of jurisdiction, unless the plaintiffs shall amend to correct the jurisdictional defect."

The report and opinion of the Master is printed page 57 and not otherwise reported; there was no opinion of the District Court. The opinion of the Circuit Court of Appeals rendered August 30, 1932, is printed page 99 of the record and is reported in 61 Federal (2nd) 115.

This Court allowed certiorari "limited to the question of Federal jurisdiction other than questions relating to diversity of citizenship."

II.

Jurisdiction.

The jurisdiction of this Court is rested on section 240 of the Judicial Code as amended by the act of February 13, 1925, chapter 229, section 1, 43 Statutes 938; section 347 U. S. C. A., page 359, Title 28, subdivision "A" of said section.

III.

The grounds upon which the jurisdiction of this court is invoked.

The grounds upon which the jurisdiction of this Court is invoked as stated in subdivision B of paragraph 9 of the petition for the writ, which writ as allowed was limited to a discussion of the matters therein contained, is

The Circuit Court of Appeals in its determination that, notwithstanding that the jurisdiction of the Federal court was invoked upon the ground that there was a substantial question involved arising under the laws of the United States, the District Court having decided adversely to the plaintiffs as to the Federal question, could not proceed to determine the merits of the case arising under the general and local and state laws, cut down the effect of this Court's determination in *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, at page 191, 53 L. Ed., at page 757, in a manner probably in conflict with the applicable decisions of this Court, and in direct conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Vogue Co.* v. *Vogue Hat Co.*, 12 Fed. (2nd) 991, in which latter case the Circuit Court of Appeals for the Sixth Circuit said that its views were in conflict with the decision of the Second Circuit Court of Appeals in *Bernstein* v. *Danwitz*, 190 Fed. 604, 605. *General Investment Co.* v. *Lakeshore and M. S. Railway Co.*, 269 Fed. 235, another decision of the Sixth Circuit Court of Appeals, in which, at page 241, the Court expressed the same views as in the later case of *Vogue Co.* v. *Vogue Hat Co.*, 12 Fed. (2d) 991, came to this Court in 260 U. S. 261, 67 L. Ed. 244, and this Court affirmed, with modification, not important here, and there was no criticism in the opinion of this Court of the language of the Circuit Court of Appeals for the Sixth Circuit as to the effect of this Court's decision in *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, 53 L. Ed. 753. The Second Circuit Court of Appeals (conceded by itself) is in irreconcilable conflict with the Sixth Circuit Court of Appeals as to the effect of this Court's decision in the case last cited.

IV.

Statement of the Case.

At the time the petitioners filed their bill of complaint herein they were all engaged in fabricating steel without the State of New York for the construction of buildings from material brought in from states other than those in which the plants were located, and in erecting such fabricated steel in New York City. The contracts under which the steel was fabricated and furnished erected in such buildings were made with general contractors in New York, each said contract, as a single transaction, providing for both the fabrication of the steel in states other than New York specially designed for specific buildings, and the erection of said steel by petitioners in New York, the fabricated article being transported from the place where fabricated to New York by petitioners in interstate commerce, that is to say, one contract required both the fabrication and the erection of the steel as part of one operation. The petitioners also did some fabricating of steel without the State of New York from material brought in from such other states and sold the fabricated steel F. O. B. New York City, for erection therein (fabricated specifically for specific buildings). By their bill of complaint filed on March 11, 1925, they sought to enjoin respondents, certain individuals, and Paul J. Morrin, individually and as president of International Association of Bridge, Structural and Ornamental Iron Workers and several locals of the International located in New York, from continuing a secondary boycott against plaintiffs, for the purpose of forcing plaintiffs, who had operated open shop since 1906, to abandon

that policy and enter into closed union shop agreements with the International and its locals, the effect of which would be that, for practical purposes, the entire building industry in the Metropolitan district would be completely unionized and no non-union workman could secure employment, the industry then being completely unionized with the exception of the erection of structural iron and steel. The charge was one of conspiracy to attain an illegal object and likewise that illegal means were employed, threats, intimidation and the like, to accomplish the success of the boycott (p. 1). The jurisdiction of the Court was rested upon: (1) diversity of citizenship; (2) unlawful interference with interstate commerce; (3) violation of constitutional rights of plaintiffs (Par. 20 of bill, p. 16). Upon the filing of the bill temporary restraint went which, after argument, was continued pending final hearing.

The allegations of the bill with respect to the claimed interference with interstate commerce are found in paragraph 18, page 14, and read as follows:

> "Plaintiffs and each of them are all engaged in interstate commerce and plaintiffs charge that the defendants and each of them have formed and are engaged in a conspiracy in restraint of trade and commerce among the several states; that plaintiff's steel used in the erection of buildings in the Metropolitan District in the City of New York and in that portion of the Metropolitan District within the State of New Jersey and in other states of the Union are transported between the several states; that all of the steel used in the City of New York by plaintiffs is transported by plaintiffs from other states; that a portion of the steel used by plaintiffs in the construction in the City of New York and in that portion of the Metropolitan District in the State of New

Jersey is bought by plaintiffs in other states and transported by plaintiffs to New York, other portions of said steel are fabricated by plaintiffs without the State of New York and brought into the State of New York for erection and other portions of said steel are purchased by said plaintiffs for delivery in the City of New York from manufacturers without the State of New York and by said manufacturers transported to the City of New York; that the purpose and intent of said defendants is to prevent the use of said steel in the Metropolitan District somewhere and wherever erected by plaintiffs; that the purpose of said defendants is also to monopolize all labor within the Metropolitan District and within the States of New York and Pennsylvania and New Jersey and throughout the country; that the effect of the success of said defendants will be to destroy the interstate traffic of plaintiffs in steel and will also be to prevent any person not a member of a union from obtaining employment in the building industry; that the purpose of defendants is to compel plaintiffs and all other employers engaged in the construction of structural iron and steel in the territory aforesaid to sign agreements with defendants whereby they will agree not to employ laborers except members of said defendants' unions; plaintiffs charge that the said defendants are therefore engaged in a conspiracy in restraint of trade or commerce among the several states and that the said conspiracy is illegal and the jurisdiction of this court is involved upon that ground."

The jurisdiction of the District Court was specially invoked upon the ground that a Federal question was involved (Par. 21 of bill, p. 17).

Defendants, respondents here, filed an answer and by paragraph 19, on information and belief, denied the allega-

tions of paragraph 18 of the bill and charged that the acts of the defendants mentioned in the complaint were wholly intrastate transactions and had no relation whatever to interstate commerce. Respondents likewise filed a counterclaim against plaintiffs (p. 42) appealing to the jurisdiction of the Court for relief upon various grounds, some based upon the Federal anti-trust acts and others upon the common law.

By consent, an order of reference was made to a Master (p. 57), who took voluminous testimony (p. 58). He filed a voluminous report (pp. 57 to 96), finding that plaintiffs were not entitled to relief under the anti-trust acts, but that they had proven their charges of the employment of illegal methods and recommending a decree for an injunction. To this report respondents filed twenty-nine exceptions (p. 111), no one of which questions the jurisdiction of the Court. On February 14, 1930, a final decree was entered (p. 96) in pursuance of the Master's report. Respondents appealed to the Circuit Court of Appeals for the Second Circuit, and filed 18 assignments of errors (p. 111), no one of which questions the jurisdiction of the Court.

The appeal was heard by the Circuit Court of Appeals upon the merits and neither in the briefs of counsel nor in the argument was any question raised as to the jurisdiction of the Court. The Court directed a reargument upon the question as to whether the allegations of the bill, admitted by the answer, were sufficient to indicate diversity of citizenship. The case was reargued and plaintiffs contended: (1) that the allegations of the bill as to diversity of citizenship were sufficient; (2) that, irrespective of diversity of citizenship, the Court had jurisdiction because of the charge

in the bill that respondents were engaged in a conspiracy in restraint of trade and commerce among the several states (p. 14), and that, although the Federal question was decided adversely to plaintiffs, the District Court did not lose jurisdiction and might proceed to final decree upon the other issues made by the pleadings. The Circuit Court of Appeals handed down a decision on August 23, 1932 (p. 99), 61 Fed. (2nd) 115, holding that the allegations of the bill as to the residence of the Unions were not sufficient and that the case was not one in which the rule of *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, at page 191, 53 L. Ed. 753, at page 757, should be applied, and remanded the case to the District Court with leave to that Court to allow plaintiffs to amend by dismissing as against the Locals or by inserting appropriate allegations to show that no one of their members was a citizen of New Jersey or Pennsylvania when the bill was filed and if that were not done, then to dismiss the complaint without prejudice for lack of jurisdiction.

The Circuit Court of Appeals further held that the conduct of respondents did not constitute a conspiracy to illegally restrain interstate trade within the meaning of the Anti-Trust Acts and the decisions of this Court in *Bedford Cut Stone Co.* v. *Journeymen's S. C. Ass'n*, 274 U. S. 37, 71 L. Ed. 916; *Duplex Printing Co.* v. *Deering*, 254 U. S. 443, 65 L. Ed. 349, 16 A. L. R. 196; *Loewe* v. *Lawlor*, 208 U. S. 274, 52 L. Ed. 488; *United States* v. *Brims*, 272 U. S. 549, 71 L. Ed. 403, holding rather that the case was governed by *Industrial Assn. of San Francisco* v. *United States*, 268 U. S. 64, 69 L. Ed. 849; *United Leather Workers Int. Union* v. *Herkert & Meisel Trunk Co.*, 265 U. S. 457, 68 L. Ed. 1104. The Circuit Court of Appeals did not hold that the claims

of petitioners under the Anti-Trust Acts were frivolous, although intimating that it was inclined to believe that the question could not properly be thought doubtful even when the bill was filed March 11, 1925, but expressly stating that it did not decide the point nor rest its decision upon it (p. 108).

In the District Court that part of the original brief of petitioners submitted to the Master which dealt with the question of interference with interstate commerce consisted of some 11 pages; respondents' original brief, 12 pages; of petitioners' brief in reply, 12 pages, and of respondents' brief in reply, 10 pages, and of plaintiffs' brief in reply, 21 pages, and the Master considered the Federal question upon the merits (p. 93). The Federal question was never abandoned by plaintiffs and was urged upon the argument of the appeal upon the merits—that is to say, plaintiffs argued that, even if the Master were wrong in finding that respondents were guilty of illegal acts violating plaintiff's common law rights, still the decree was right because the Master should have held that the conduct of respondents was in violation of the Anti-Trust Acts. It was contended by plaintiffs that even if the Master was right in holding that the conduct of respondents did not come within the condemnation of the Anti-Trust Acts, nevertheless a substantial Federal question having been presented, at least as of the date of the filing of the bill, which is the date to be considered (*Michigan C. R. Co.* vs. *Vreeland*, 227 U. S. 59, 57 L. Ed. 417), the jurisdiction of the Federal Court attached, and it was bound, or at least privileged, to decide all questions involved in the case, even if not raising a Federal question, under the authority of *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, 53 L. Ed. 753, approved *Louisville &*

N. R. Co. v. *Garrett,* 231 U. S. 298, 58 L. Ed. 229, at page 239; *Chicago Great Western R. R. Co.* v. *Kendall,* 266 U. S. 94, 69 L. Ed. 183, at page 188; *Pacific Electric R. Co.* v. *Los Angeles,* 194 U. S. 112, 48 L. Ed. 896, at page 899; *Binderup* v. *Pathé Exchange,* 263 U. S. 291, 68 L. Ed. 308, at page 314.

The Circuit Court of Appeals recognized the authority of *Siler* v. *Louisville & N. R. Co.,* 213 U. S. 175, at page 191, 53 L. Ed. 753, to the effect that, if there was a claim as to the invalidity of a State statute because in violation of the Federal constitution, notwithstanding the fact that the Court held ultimately adversely to plaintiff upon the Federal question, nevertheless, it had jurisdiction and might decide the merits of the case upon other grounds, but it said that the principle was not of universal application referring to the line of cases represented by *Elgin Watch Co.* v. *Illinois Watch Co.,* 179 U. S. 665, 677, 45 L. Ed. 365, and then, after adverting to the fact that there was no decision of this Court to point out the line of differentiation, the Circuit Court of Appeals attempted to harmonize the two lines of cases "as best we may" and reached the conclusion, as I understand it, that it is only when it is necessary to decide the non-Federal question in order to determine the merits of the Federal question that the rule of *Siler* v. *Louisville & N. R. Co.,* 213 U. S. 175, 53 L. Ed., at page 757, applies, which view has never been expressed by this Court as conceded by the Circuit Court of Appeals, that Court stating (p. 106):

> "We think it (the differentiation) is consistent with the actual decisions of the Supreme Court, although no authority has been found which has clearly enunciated it, and it must, indeed, be recognized as scarcely consistent with some of the views

> expressed in Judge Denison's learned opinion in Vogue Co. *v.* Vogue Hat Co., 12 F. (2d) 991 (C. C. A. 6.)"

and which view, even if correct, did not apply in the case at bar because it was necessary for the Court to consider the entire case before deciding the Federal question.

The method in which plaintiffs conduct their business is stated by the Master (p. 58) and the organization of the defendant unions and their purpose (pp. 59, 60), the Master finding that defendant International Union claims for its members jurisdiction over all branches, trades and crafts of the building industry, in shop and outside, throughout the United States and Canada, comprising the fabrication, erection and construction of all iron and steel, ornamental lead, bronze, brass, copper and aluminum, reinforced concrete structures and a large number of other classes of metal work connected with the building industry, including the operation of derricks and cranes on all forms of construction work, the moving, hoisting and lowering of machinery, and practically all other work incidental to the actual construction of buildings and other structures.

The history of the conflict commencing in 1906 between plaintiffs and other contractors engaged in the same line of business is stated by the Master (p. 61, etc.). Briefly, the acts of the Union, its locals and members were as follows: They agreed among themselves that none of their members would work upon steel fabricated by plaintiffs and others engaged in the same line of business operating open shop unless plaintiffs would enter into a contract with them agreeing to employ exclusively union men; they agreed among themselves that no one of their members

would work upon buildings being erected by general contractors who had let contracts to plaintiffs, although on the particular work involved no one of plaintiffs or other contractors operating open shop was concerned and all of the work upon the particular building in all of its branches was being performed closed union shop; they agreed among themselves that no one of their members would work upon a building being erected by an owner, which owner had, upon other work, employed a contractor who had let a contract to plaintiffs or other concerns engaged in the same business operating open shop; they agreed among themselves that they would call to their assistance members of other building trades unions (the building trades in the Metropolitan District of New York being in effect one hundred per cent. unionized, so that no building can be erected without the aid of union labor), to the end that the members of such other building trade unions would decline to work upon any building upon which plaintiffs or others engaged in the same business operating open shop should have sub-contracts for the fabrication and erection of structural iron and steel or for contractors or owners who let contracts to plaintiffs or others engaged in the same business operating open shop.

The evidence showed, and the Master found, that respondents carried out their agreement and to effectuate their purpose indulged in threats and other methods of intimidation directed against owners, contractors and architects, and that their acts were inspired with legal malice within the meaning of the decision of this Court in *Hitchman Coal and Coke Co.* v. *Mitchell*, 245 U. S. 229, 62 L. Ed. 260, and *Eagle Glass Manufacturing Co.* v. *Rowe*, 245 U. S. 275, 62 L. Ed. 286, and that they were guilty of an

illegal boycott within the meaning of *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, 65 L. Ed. 349, and the Master summarizes the grounds upon which he based his conclusion that plaintiff's legal rights were being interfered with (p. 91) as follows:

> "To summarize the grounds upon which I base this conclusion: the means employed by defendants to effectuate their purposes were without legal excuse or justification and therefore unlawful (1) because said 'means' have caused intentional damage to plaintiffs' business through threatened injury to the business of innocent third persons (2) because they amounted to intentional coercion of neutrals for the purpose of injuring plaintiffs, (3) because they constituted an injury to the general public, and (4) because, after the strike of 1924 was actually over, and plaintiffs were carrying on with a full complement of workmen, defendants had no authority or standing to interfere between plaintiffs and their employes, or to create or attempt to remedy any grievance in their behalf."

At pages 67, 68 the Master found that the activities of the defendants were having their intended effect upon owners, architects and general contractors.

Had the illegal activities of the unions been continued the result would have been that plaintiffs would not only have been excluded from the Metropolitan District as fabricators and erectors of steel and their fabricated steel would have been excluded but that they and their fabricated steel would have been so excluded over the country for general building work of the nature for which plaintiffs fabricated and erected steel is to a large extent over the country performed as a result of subcontracts from con-

tractors who operate in the Metropolitan District and if one of those contractors gave a contract to plaintiffs, or others engaged in the same business operating open shop anywhere in the United States, the defendants would not perform work upon any buildings under construction in the Metropolitan District by that general contractor. The scope of defendants' activities, therefore, as indicated by the article in the New York Times of February 9, 1925, Plaintiffs' Exhibit P-21, summarizes in the Master's report, page 69, contemplated "a nation-wide movement that might mean the tie-up of millions of dollars worth of building operations all over the country." The conclusion to which the Master came is expressed by him in his report, page 90, as follows:

> "Therefore, I find the fact to be that the defendants, in carrying out their plan to cause the plaintiffs and the other members of the iron league, against their will, to abandon their open shop policy, intentionally entered into a conspiracy to effectuate said plan, and that the acts and conduct of defendants in that behalf were done and committed with the object and purpose intentionally to injure or destroy plaintiffs' business unless they would agree to operate on a union closed shop basis, and intentionally to injure the business and property rights of owners, architects and general contractors, unless they would refuse to award sub-contracts to plaintiffs and other members of the league. I further find that the said acts and conduct of defendants were done maliciously, that is, intentionally and without legal excuse or justification."

Upon the matter of interference with interstate commerce the Master found that, because there was no proof

of an actual intent or purpose to interfere with interstate commerce and because the steel was not condemned as unfair, and interference with its movement was not defendants' primary aim, the work of erecting steel must be regarded as merely local, and, notwithstanding the fact that plaintiffs took single contracts including both the fabrication of the steel in other states and the erection of the steel in New York, there was no actionable interference with interstate commerce, citing *Bedford Cut Stone Co.* v. *Journeymen S. C. Asso.*, 274 U. S. 37, 71 L. Ed. 916; *Industrial Assn. of San Francisco* v. *United States*, 268 U. S. 64, 69 L. Ed. 849.

V.

Specification of Error.

The Circuit Court of Appeals erred in holding that, although the jurisdiction of the District Court was invoked upon the ground that the case was one arising under the laws of the United States, the District Court had no jurisdiction to proceed and determine the case upon the merits under general local or state laws once having determined the Federal question against plaintiffs, that question being, however, substantial.

ARGUMENT.

The Circuit Court of Appeals erred in holding that although the jurisdiction of the District Court was invoked upon the ground that the case was one arising under the laws of the United States, the District Court had no jurisdiction to proceed and determine the case upon the merits under general local or State laws once having determined the Federal question against plaintiffs, that question being, however, substantial.

(A)

The claim of plaintiffs based upon alleged interference with interstate commerce was not unsubstantial.

It can hardly be urged that the claim of illegal interference with interstate commerce was unsubstantial in the light of the fact that no motion was made to strike the allegations with respect to it from the bill and that it was argued upon its merits before the Master, many pages of the briefs of counsel for each side being devoted to its consideration on the merits and that it was argued by both sides upon its merits in the Circuit Court of Appeals.

It is, however, suggested by the Circuit Court of Appeals, that at the time this bill was filed, March, 1925, which is the important date (see *Michigan C. R. Co.* v. *Vreeland,* 227 U. S. 59, 57 L. Ed. 417 (1913); *Boston Store* v. *American Graphophone Co.,* 246 U. S. 8, 62 L. Ed. 551 (1918), the Federal question was not doubtful. But it expressly declined to decide the point or to rest its decision upon it. The Circuit Court of Appeals mentioned *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344, 66 L.

Ed. 975; *United Leather Workers Int. Union* v. *Herkert & Meisel Trunk Co.*, 265 U. S. 457, 68 L. Ed. 1104, as having been decided at that time. But likewise, this Court had decided *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 68 L. Ed. 308; *Ramsey* v. *Associated Bill Posters*, 260 U. S. 501, 67 L. Ed. 368; *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 65 L. Ed. 349.

Pending the hearing of the case and before the argument before the Master, this Court had decided *Bedford Cut Stone Co.* v. *Journeymen S. C. Asso.*, 274 U. S. 37, 71 L. Ed. 916.

The Circuit Court of Appeals referred to its decision in *Aeolian Co.* v. *Fisher*, 29 Fed. (2d) 679 (1928), in which case, by a divided court, it affirmed the District Court in denying a motion for a temporary injunction, but when the case came to the Circuit Court of Appeals again on the refusal of the District Court to grant a permanent injunction, 35 Fed. (2d) 34, it reversed the District Court, 40 Fed. (2d) 190. The decisions of the Circuit Court of Appeals in the Aeolian case illustrate better than anything else could, perhaps, that the claim of plaintiffs under the Anti-trust Acts, considered as of 1925 (or as of this date) was at least substantial. It is only when the claim is so unsubstantial as that it would be forthwith stricken that it can be deemed so unsubstantial as to be frivolous or, in other words, so plainly without color of merit (see *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 68 L. Ed. 308, at p. 314), as that Federal jurisdiction cannot be maintained upon the allegations contained in the bill.

The Circuit Court of Appeals refers to the fact that there was no motive on respondents' part to interfere with interstate commerce. As to this suggestion *International*

Organization v. *Red Jacket C. C. Co.,* 18 Fed. (2d) 839; *United States* v. *Reading Co.,* 226 U. S. 324, 57 L. Ed. 243, holding that, where the necessary results of the acts performed pursuant to or contemplated by the conspiracy is to restrain trade between the States, the intent is presumed, supply the answer.

In *Bedford Cut Stone Co.* v. *Journeymen S. C. Asso.,* 274 U. S. 37, 71 L. Ed. 916, the petitioners were twenty-three companies, engaged in the business of quarrying or fabricating, or both quarrying and fabricating, Indiana limestome in Indiana. The unions were composed of stone cutters, carvers, curb cutters, curb setters, bridge cutters, planermen, lathemen and carborundum moulding machine operators, engaged in the cutting, patching and fabrication of all natural and artificial stones. The defendants were found to have agreed to prevent the erection of that stone in buildings. This Court held that the enforcement of the order to strike against the petitioners' product could have no purpose other than coercing or inducing the local employers to refrain from purchasing such product and the fact that the means adopted to bring about the contemplated restraint of commerce operated after physical transportation had ended is immaterial and that the restraint of such commerce was the necessary consequence of the acts and conduct and immediate end in view, and that since the strikes were directed against the use of the product in other States, with the immediate purposes and necessary effect of restraining future sales and shipments in interstate commerce, the determinative decisions to be applied were those pointed out in the *United Leather Workers International Union* case, 265 U. S. 457, 68 L. Ed. 1104, at page 469, and this Court said:

> "Whatever may be said as to the motives of the respondents or their general right to combine for the purpose of redressing alleged grievances of their fellow craftsmen or of protecting themselves or their organization, the present combination deliberately adopted a course of conduct which directly and substantially curtailed, or threatened thus to curtail, the natural flow in interstate commerce of a very large proportion of the building limestone production of the entire country, to the gravely probable disadvantage of producers, purchasers and the public; and it must be held to be a combination in undue and unreasonable restraint of such commerce within the meaning of the Anti-trust Act as interpreted by this court. An act which lawfully might be done by one, may when done by many acting in concert take on the form of a conspiracy and become a public wrong, and may be prohibited if the result be hurtful to the public or to individuals against whom such concerted action is directed."

As stated above plaintiffs fabricated this steel in states other than New York for erection by themselves in New York under contracts providing both for fabrication and erection and they also fabricated steel for sale to others F.O.B. New York for erection by those others and the steel in every case was specially fabricated in the plants of plaintiffs for specific buildings and the raw materials going into the steel came from still other states. The effect on interstate commerce was just as direct as was the effect of the conduct of the defendants in *Bedford Cut Stone Co.* v. *Journeymen S. C. Asso.*, 274 U. S. 37, 71 L. Ed. 916.

(B)

Notwithstanding the fact that the Master found that there was not actionable interference with interstate commerce the District Court was justified in making the decree which it did upon the authority of *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, 53 L. Ed. 753 and cases following.

In setting out the opinion of the Circuit Court of Appeals in the statement of facts, I have indicated the scope of that opinion and the view which that Court took of this Court's opinion in *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, 53 L. Ed. 753.

The conflicting opinions of the Circuit Court of Appeals for the Sixth and Second Circuits: *Vogue Co.* v. *Vogue Hat Co.*, 12 Fed. (2d) 991 (6th); *General Investment Co.* v. *Lake Shore and M. S. R. R. Co.*, 269 Fed. 235 (6th), and the case at bar, indicate beyond question that one or the other Circuit Courts of Appeal has misapprehended the scope of this Court's decision in the Siler case reaffirmed by this Court as lately as *Chicago Great Western R. R. Co.* v. *Kendall*, 266 U. S. 94, 69 L. Ed. 183, page 188.

The manner in which the Circuit Court of Appeals for the Second Circuit attempts to harmonize the Siler case and the cases following it with what it conceives to be a limitation upon the rule of that case illustrated by *Elgin Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665, 677, 45 L. Ed. 365, really results in giving no effect whatever to what this Court said in the Siler case, for, as I understand the opinion of the Circuit Court of Appeals, it is to the effect that, only where it is necessary for the Federal Court to determine the local question first so that it may be able to reach a conclusion as to the ultimate question involving the Fed-

eral constitution or statutes, does the District Court have power to determine the local question, which certainly is not the conception either of the bar or of the Sixth Circuit Court of Appeals of what this Court held in the Siler case.

I do not think that it has ever been questioned but that the Federal District Court had the power to determine the local question if it were necessary so to do to determine the Federal matter. What was questioned was whether, if jurisdiction was based upon the ground that the case arose under the Constitution and the laws of the United States, that Federal question being substantial, the Court having determined that question against the plaintiffs, the Court could then proceed and determine the case upon its merits according to local law, and I submit that that was the question which was answered in the affirmative by this Court in the Siler case.

In the Siler case a bill was filed in the United States Circuit Court to enjoin an order made by a railroad commission in the United States Circuit Court, the jurisdiction of that Court being based upon a claim that the rates were so low as to be confiscatory and that the effect of the statute under which the rates were fixed was an interference with interstate commerce. Included in the same bill was a claim wholly of a non-Federal nature to the effect that the commission had no power to make the order under a correct and proper construction of the State statute. The Circuit Court decided that the statute and the order made under it by the railroad commission were confiscatory. The commission appealed directly to this Court. The jurisdiction of the Circuit Court was attacked. This Court declined to decide the Federal question and in an opinion delivered for a unanimous court Mr. Justice Peckham said (53 L. Ed., at p. 757):

"The Federal questions as to the invalidity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the circuit court jurisdiction, and, having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.

This court has the same right, and can, if it deem it proper, decide the local questions only, and omit to decide the Federal questions, or decide them adversely to the party claiming their benefit. Horner *v.* United States, 143 U. S. 570, 576, 36 L. ed. 266, 268, 12 Sup. Ct. Rep. 522; Fallbrook Irrig. Dist. *v.* Bradley, 164 U. S. 112, 154, 41 L. ed. 369, 387, 17 Sup. Ct. Rep. 56; Penn. Mut. L. Ins. Co. *v.* Austin, 168 U. S. 685, 694, 42 L. ed. 626, 630, 18 Sup. Ct. Rep. 223; Burton *v.* United States, 196 U. S. 283, 295, 49 L. ed. 482, 485, 25 Sup. Ct. Rep. 243; Williamson *v.* United States, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163; People's Sav. Bank *v.* Layman, 134 Fed. 635; Michigan R. Tax Cases, 138 Fed. 223. Of course the Federal question must not be merely colorable or fraudulently set up for the mere purpose of endeavoring to give the court jurisdiction. Penn. Mut. L. Ins. Co. *v.* Austin, 168 U. S. 695, 42 L. ed. 630, 18 Sup. Ct. Rep. 223; Michigan R. Tax Cases, *supra.*

The character of some of the Federal questions raised is such as to show that they are not merely colorable, and have not been fraudulently raised for the purpose of attempting to give jurisdiction to a Federal court. • • •

Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is

> not departed from without important reasons. In this case we think it much better to decide it with regard to the question of a local nature, involving the construction of the state statute and the authority therein given to the commission to make the order in question, rather than to unnecessarily decide the various constitutional questions appearing in the record."

This Court then expressed itself that, under the statute, the commission had no authority to make a general tariff of rates and affirmed the decree of the Circuit Court for that reason.

In *People's Savings Bank* v. *Layman, County Treasurer (Circuit Court, Southern District of Iowa)*, 134 Fed. 635, cited with approval by this Court in the Siler case, the bill was filed to remove an assessment as a cloud upon title and it was charged that the complainant was entitled to have deducted from the net worth of the bank the amount of United States bonds held by it. It was also charged that if the bonds were not properly deducted still the treasurer had no right to add to the assessment after the bank had been once assessed. The District Court came to the conclusion that the bank had no right to have the value of the bonds deducted. It then proceeded to consider the strictly local question, *i. e.*, could the bank be reassessed after it had been once assessed? Considering the matter from a purely local standpoint and a construction of State statutes, the Court held that there could be no re-assessment and gave a decree for an injunction.

It would appear from the last paragraph of the Court's opinion that it was argued that, having decided the only Federal question in the case adversely to plaintiffs, it lost jurisdiction, in reply to which the Court said, 134 Fed. 641:

"4. The jurisdiction of this court attaches because of the federal question, viz., should the reduction from the value of the shares of stock be made because of the United States bonds? That question, regardless of the citizenship of the parties, gave this court power to take the case and adjudicate the matters in controversy. And the fact that this court has adjudicated the federal question adversely to the bank does not deprive the court of jurisdiction over the other question. The rule is correctly stated in the decision of Judge Brewer in the case of Street Railway Company *v.* Cable Company (C. C.), 32 Fed. 727."

In the *Michigan Railroad Tax Cases,* 138 Fed. 223, cited with approval by this Court in the Siler case, there was a bill in equity to enjoin collection of taxes and the jurisdiction of the Court was invoked upon the ground that the constitution and statute of Michigan under which the tax was levied were repugnant to the Constitution of the United States. The Court said upon the subject we are discussing, and I quote it copiously because the language was before this Court when it decided the Siler case and the language of the Court in the Michigan Railroad Tax Cases may be considered in connection with what this Court said in the Siler case, 138 Fed. 230:

"But it is seriously contended by the defendant that if the federal questions which are raised by the bills, which it is conceded are not fictitious, and which gave the court jurisdiction, are decided against the complainants, although the court had jurisdiction to dispose of these questions, its jurisdiction immediately ceases, and it may not decide the question of the undervaluation of the property of the state which is not taxed under the statute in question,

when compared with the valuation placed upon the property of the complainants which is so taxed. Of course, if the claim that the Constitution and statute of the state violate the Constitution of the United States is fictitious and fraudulent, the Circuit Court of the United States could not acquire jurisdiction; but if that claim is real, and the court acquired jurisdiction, it does not lose it because its decision on that question is against the complainants' contention. If this were not so, all bills for injunction, in which the jurisdiction of the federal court is invoked on account of a statute or Constitution of a state contravening the provisions of the federal Constitution, should be disposed of without putting the parties to the expense of taking testimony, because no testimony could possibly be considered. If it were found that the contention of the complainants was well founded, then an injunction would follow as a matter of course; and if it were found that the Constitution or statute did not violate the provisions of the federal Constitution, the jurisdiction of the court would immediately determine, and the bill be dismissed. If that contention is well founded, then in these cases two years of time, and many thousands of dollars spent in taking testimony, should have been saved. But we cannot assent to this view. If the court actually acquires jurisdiction, that jurisdiction, although acquired because the Constitution or law of a state is claimed to be in contravention to the Constitution of the United States, extends to all questions involved in the controversy, and not merely to the question of the violation of the federal Constitution. Jurisdiction of a federal court having been properly invoked for relief against assessments as discriminating against complainant, and thus depriving it of the equal protection of the laws, under the fourteenth amendment, where the complainant fails to show discrimination the bill may be retained

> to administer relief on other grounds, although the state court could afford adequate remedy. This was held in Louisville Trust Co. *v.* Stone, 107 Fed. 305, 46 C. C. A. 299, where Justice Day, in delivering the opinion of the Circuit Court of Appeals of this circuit cites with approval the case of Nashville, etc., Railway Co. *v.* Taylor (C. C.) 86 Fed. 168, in which the grounds of federal jurisdiction are carefully examined and fully stated in an able opinion by Judge Clark. Where the Supreme Court of the United States acquires jurisdiction on appeal from this court only because a law of a state is claimed to be in contravention of the Constitution of the United States, the appeal is not dismissed because the Supreme Court decides that the claim of the federal question involved is not well founded. If the claim is real and is made in good faith, then the Supreme Court acquires jurisdiction of the entire case, and of all questions involved in it."

This Court, in *Louisville & Nashville Railroad Co.* v. *Garrett*, 231 U. S. 298, 58 L. Ed. 229, in a case to enjoin the enforcement of orders of a railroad commission upon the ground that the orders violated the statutes of the United States and the statutes of the state, speaking by the present Chief Justice, said, 231 U. S. 298, at page 303, 58 L. Ed. 239:

> "Because of the Federal questions raised by the bill the circuit court had jurisdiction and was authorized to determine all the questions in the case, local as well as Federal. Siler *v.* Louisville & N. R. Co., 213 U. S. 175, 191, 53 L. ed. 753, 757, 29 Sup. Ct. Rep. 451."

To the same effect is *Greene* v. *Louisville & Interurban Railroad Co.*, 244 U. S. 499, 61 L. Ed. 1280, and *Davis* v.

Wallace, 257 U. S. 478, 66 L. Ed. 325, and *Lincoln Gas & Electric Light Co.* v. *Lincoln,* 250 U. S. 256, 63 L. Ed. 968, and *Southern Railroad Co.* v. *Watts,* 260 U. S. 519, 67 L. Ed. 375, and *Atlantic Coast Line R. Co.* v. *Daughton,* 262 U. S. 413, 67 L. Ed. 1051.

In *Chicago Great Western Railway Co.* v. *Kendall,* 266 U. S. 94, 69 L. Ed. 183, this Court, speaking by the late Chief Justice Taft, said, 266 U. S. 97, 69 L. Ed. 188:

> "Jurisdiction of the bill in the Rock Island Case depends on the averment that the attempted assessment of complainant's railroad property in Iowa, complained of, was at a rate and upon a basis greater than the assessment of other property of the same class subjected to taxation in Iowa, and that the suit arises under the 14th Amendment to the Federal Constitution forbidding any state to deprive any person of his property without due process of law, or to deny him the equal protection of the law. We think this averment, in view of the allegations of the bill, invoked a substantial controversy under the Federal Constitution, and gave the district court jurisdiction. Its jurisdiction thus established gave the district court the authority to determine all questions involved, including questions of state law, irrespective of the disposition of the Federal question; and as the relief to which the complainant might be entitled would be the same as that which should be allowed him by the Federal court upon a construction of the state Constitution and laws such as he contends for, the question whether the acts complained of violated the Federal Constitution need not be decided. * * * It follows, therefore, that in both the cases under consideration, the district court has jurisdiction to consider and decide whether the complainants in these cases are so injured by a violation of the state Constitution and laws in the taxation of their prop-

> erty as to entitle them to the equitable remedy of injunction against the taxing officials made defendants."

The Circuit Court of Appeals below, however, considered that there was a limitation placed upon the rule announced by these cases by the decision of this Court in *Elgin Watch Co.* v. *Illinois Co.*, 179 U. S. 665, 45 L. Ed. 365, and the cases following it, *A. Leschen & Sons Rope Co.* v. *Broderick & Bascom Rope Co.*, 201 U. S. 166, 50 L. Ed. 710; *Stark Brothers* v. *Stark*, 255 U. S. 52, 65 L. Ed. 496, and reference was also made to *Standard Paint Co.* v. *Trinidad Asphalt Co.*, 220 U. S. 446, 456, 55 L. Ed. 536; *Geneva Furniture Co.* v. *Karpen*, 238 U. S. 254, 59 L. Ed. 1295. This line of cases has been so well distinguished by Judge Denison, delivering the opinion for the 6th Circuit Court of Appeals in *Vogue Co.* v. *Vogue Hat Co.*, 12 Fed. (2d) 991, as that I can do no better than to repeat his language, 12 Fed. (2d) 993:

> "However, there is another familiar line of cases, growing out of the power of the Supreme Court of the United States to review the decisions of state courts. Upon principles of public policy, it may be important that this power should be confined to the federal question, and the language of the various statutes indicates this restriction. Accordingly, we find the Supreme Court repeatedly refusing to consider any other question after it has decided this first one adversely to the appellant.
>
> It is this latter restrictive principle, which to some extent the Supreme Court has applied to the patent-plus-unfair competition cases. In the earliest one which has come to our attention the Circuit Court of Appeals had said (Illinois Co. *v.* Elgin Co.,

94 F. 667, at page 669, 35 C. C. A. 237, 239) that 'It is of course, clear that the bill could not be sustained unless the federal right was sustained.' The registered trade-mark, by virtue of which alone federal jurisdiction was invoked, was held to be invalid. The Supreme Court rather summarily (179 U. S. 677, 21 S. Ct. 275, 45 L. Ed. 365) affirmed, saying that, 'if the trade-mark were not lawfully registered, then jurisdiction could not be maintained.' In neither court was the suggestion advanced or considered that the good faith claim of federal right gave jurisdiction to decide all grounds of the controversy. In Lescher *v.* Broderick, the Circuit Court of Appeals held (134 F. 571, 67 C. C. A. 418), on authority of the Elgin Case, that, if the registered trade-mark was invalid, there was no jurisdiction to hear the remainder of the quarrel between the parties who were citizens of the same state. The Supreme Court, in 201 U. S. 172, 26 S. Ct. 427, 50 L. Ed. 710, said: 'Our jurisdiction depends solely upon the question whether plaintiff has a registered trade-mark valid under the act of Congress.' Again the general principle that a jurisdiction, once acquired, extends to the whole controversy, was not considered. The only other touching of the question by the Supreme Court which we find is in Stark *v.* Stark, 255 U. S. 50, 52, 41 S. Ct. 221, 65 L. Ed. 496, where the Leschen Case is somewhat casually cited as indicating this limitation on the federal trial courts.

Geneva Co. *v.* Karpen, 238 U. S. 254, 255, 259, 35 S. Ct. 788, 59 L. Ed. 1295, is also now cited to the same effect; but that case seems to have presented in the end a question of venue rather than of subject-matter. It was in effect held that the restriction of personal jurisdiction over a defendant to the district of his residence (or plaintiff's) was a funda-

mental protection to him, and hence that the exception permitting him to be sued elsewhere for patent infringement would not be enlarged to permit him to be sued away from home also for something else, even though the two grounds of suit might otherwise be united. The decision cannot well be carried further. If the comment (page 259 (35 S. Ct. 790)), 'The rule otherwise prevailing respecting joinder of actions in equity cases must, of course, yield to the jurisdictional statute,' were to be taken at its fullest extent, it would be inconsistent with the rule of the Siler and Davis Cases, *supra*, and that cannot have been the intent.

So, also, we are now cited to Standard Co. *v.* Trinidad Co., 220 U. S. 446, 31 S. Ct. 456, 55 L. Ed. 536; but that case is not helpful here. The point decided was that, where there was diverse citizenship in a case based upon a registered trade-mark and unfair competition, the jurisdiction of the District Court was not so entirely dependent on the diverse citizenship, even after a decision that the registry was invalid, so as to make the decision of the Circuit Court of Appeals final under sections 128 and 241 of the Code, being Comp. St. secs. 1120, 1218 (in their then current form). The implications as to what would have been the result, if there had been no diverse citizenship, are too indefinite for positive application here."

In *General Inv. Co.* v. *Lake Shore & M. S. Ry Co.*, Circuit Court of Appeals for the Sixth Circuit, 269 Fed. 235 there was a bill to enjoin violations of the anti-trust act and also to enjoin the contemplated consolidation of two railroad companies there involved upon the ground that there would be a violation of the constitutions, statutes, and public policies of the states concerned. The case was

originally instituted in the State Court and was removed to the Federal Court upon the ground—(1) the matter arose under the laws of the United States; (2) diversity of citizenship. The Circuit Court of Appeals held that there was no cause of action stated under the Federal laws. The court also held that the bill alleged no substantial damages. It was insisted that the case should, therefore, be remanded to the State Court rather than that a decree be entered dismissing the bill. To this suggestion the Circuit Court of Appeals answered (269 Fed. p. 241), as follows:

> "The suggestion presents itself whether there may be a duty to remand to the state court rather than dismiss the bill. Since we hold that plaintiff does not state a good case for relief arising under the laws of the United States, it might be said that jurisdiction to dispose of the merits then rests only on diverse citizenship, and that this was an insufficient basis, in the face of our holding that the bill alleges no substantial damages. In a controversy like this, the damage to plaintiff is not necessarily the only amount involved; but, if it were, this result does not follow. If the case had been originally commenced in the federal court, and the jurisdiction of that court had been invoked only on the ground that the case arose under the laws of the United States, it is settled that the court would proceed to dispose of all the questions in the case, even after it had reached the conclusion that plaintiff had failed to make out a good case on the federal question. Siler *v.* Louisville Co., 213 U. S. 175, 191, 29 Sup. Ct. 451, 53 L. Ed. 753. We do not see how the question is different when the case is begun in the state court and is removed. See Missouri *v.* Missouri Com'rs., 183 U. S. 53, 59, 22 Sup. Ct. 18, 46 L. Ed. 78. If we thought no federal question was then in-

> volved, so that the case had not been removable on that ground, we would have a different situation; but we have not reached any such conclusion as that. The case, as formulated in the bill, plainly was one arising under the laws of the United States. The removal, whether on that ground or not, brought into the federal court a case which then came to be rightly here, and jurisdiction of the case so obtained (and to the extent possessed by the state court) continues for all purposes."

This Court modified the decree by making the dismissal without prejudice to all parts of the bill but not upon the ground of lack of jurisdiction of the District Court to grant relief because of the claimed infractions of the State constitutions and laws but upon the ground that the pleadings did not show a right to equitable relief. 260 U. S. 261, 67 L. Ed. 244.

There was no criticism of the position taken by the Circuit Court of Appeals that, although that Court had determined the Federal question adversely to the plaintiffs, the Court retained jurisdiction to determine the local question. The Circuit Court of Appeals for the 2nd Circuit in the case at bar states that in the General Investment Co. case "there was Federal jurisdiction over the second (the local question) because of diverse citizenship." But the Circuit Court of Appeals in the General Investment case had held that the bill alleged no substantial damages which it was claimed indicated that the Federal Court had no jurisdiction upon the ground of diversity of citizenship because the jurisdictional amount was not involved. While the Circuit Court of Appeals did say that the damage to the plaintiff is not necessarily the only amount involved, it placed its ruling that the Federal Court had jurisdiction over the local ques-

tion upon the ground that jurisdiction was invoked upon the ground that the case was one arising under the statutes of the United States.

The Circuit Court of Appeals in the case at bar attempted to reconcile the line of cases illustrated by *Siler* v. *Louisville & N. S. R. Co.*, 213 U. S. 175, 53 L. Ed. 753, and that illustrated by *Elgin Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665, 677, 45 L. Ed. 365, by holding, in effect, that it is only where the United States District Court must necessarily decide the local question before deciding the Federal question that the local question can be decided if the Federal question be decided adversely to the plaintiff. But there is no suggestion in any decisions of this Court of any such limitation upon the principle of the Siler case and any such circumscription of the principle is, I submit, contrary to the express language of this Court.

If the rule be as stated by the Circuit Court of Appeals for the 2nd Circuit in the case at bar, then nothing is left of the principle of the Siler case because, as I have heretofore stated, it never was doubted but that, if there was a local question which had to be decided before the Court could approach the Federal question, the Court would have the right to decide the local question. Moreover, it was not necessary in the Siler case or in the cases following it, to decide the local question in order to decide the Federal question as is very clearly pointed out by Judge Wanty in the *Michigan Tax* cases, 138 Fed. 223, at page 230, which case was cited by this Court in the Siler case.

The jurisdiction of the Federal Court was invoked in the *Siler* case upon the ground that the rate orders of the Commission under review were violative of the Fourteenth Amendment in that they were confiscatory. Having thus

invoked the jurisdiction of the Court solely by reason of the existence of a Federal question, the bill also charged that in making such orders the Commission exceeded its statutory authority. The determination of the Federal question presented depended in no wise upon the determination of the question of State law raised. Nor was the decision of the latter question a decision necessary to be determined in passing upon the Federal question. On the contrary, the Federal question presented depended in the first instance upon the determination of issues of fact relating to the valuation of the plaintiff's property and its income and expenses under the rates prescribed, while the question of State law related solely to the interpretation of the act under which the Commission had proceeded. It was upon this state of facts and the issues raised thereby that the broad language hereinbefore quoted from the decision in the *Siler* case (p. 22) was used, wherein it was stated that the Court having obtained jurisdiction by reason of the raising of a Federal question,

> "had the right to decide all the questions in the case even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only."

Under these circumstances, the Circuit Court of Appeals clearly erred in holding the doctrine of the *Siler* case to be limited to cases in which it is necessary for the Court to determine questions of State or general law before it may determine the Federal questions raised. Whatever the distinction between the *Siler* case and the *Elgin Watch* and other cases relied on by the Circuit Court of Appeals, it is not the distinction sought to be drawn by that Court.

Nor would the jurisdiction of the Court in the *Siler* case have been any less complete if the Federal question on which its jurisdiction was solely invoked had arisen, as in the present case, under a Federal statute instead of under the Constitution itself. Clearly, if the rate orders of the State Commission in that case had been assailed upon the ground that they were void, because constituting an interference with interstate commerce under the Interstate Commerce Act, instead of because violative of the Fourteenth Amendment, the jurisdiction of the Court would have been equally complete, and it would have obtained jurisdiction to determine the question of State law presented if its decision upon the Federal question raised was adverse to the plaintiff, or if it had omitted to decide such question at all. It is idle to suggest that in such a situation a railroad company affected by such an order would be required to split its cause of action—assuming that it could properly and lawfully do so—and bring suit in the Federal Court to enjoin the order as violative of a Federal statute, and at the same time proceed in the State Court to set it aside by reason of violation of the State law, or, in the alternative, proceed in the State Court alone if it desired to make certain the retention of both grounds of attack. Yet such would be the practical effect of the interpretation placed upon the *Siler* case by the Circuit Court of Appeals in any case where the determination of the issues raised by the Federal question, whether of law or of fact, may be doubtful. The only distinction between the case assumed and the present case is that in the present case the Federal question presented arose under the Sherman Act instead of under the Interstate Commerce Act. Nor is there anything either in the subsequent decisions of this Court following the *Siler* case

or in the facts under which they arose, suggestive of the limitation imposed by the Circuit Court of Appeals upon the doctrine of these cases. On the contrary, in all such cases, as in the *Siler* case itself, the questions of local or general law involved where wholly independent of the Federal question presented and in no way necessary to its determination. (See cases cited, p. 26 *ante.*)

In *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 61 L. Ed. 1280, this Court stated at page 1285:

> "(3) The contention of plaintiffs, set forth in their respective bills of complaint, that the action of the Board of Valuation and Assessment in making the assessments under consideration and the threatened action of defendants in respect of carrying those assessments into effect constituted action by the State, and if carried out would violate the equal protection provision of the Fourteenth Amendment, presents, without question, a real and substantial controversy under the Constitution of the United States, which (there being involved a sum and value in excess of the jurisdictional amount) conferred jurisdiction upon the federal court, irrespective of the citizenship of the parties. This being so, the jurisdiction of that court extended, and ours on appeal extends, to the determination of all questions involved in the case, including questions of state law, irrespective of the disposition that may be made of the federal question, or whether it be found necessary to decide it at all. *Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175, 191, 53 L. Ed. 753, 757, 29 Sup. Ct. Rep. 451; *Ohio Tax Cases*, 232 U. S. 576, 586, 58 L. Ed. 738, 743, 34 Sup. Ct. Rep. 372."

That the Court never intended any such limitation is also demonstrated by its decision in *Lincoln Gas Company* v. *Lincoln*, 250 U. S. 256, 63 L. Ed. 968, wherein the Court

pointed out (at p. 975) the error of counsel for plaintiffs below in assuming that the tax ordinance therein involved could be assailed in a court of the United States only upon the ground that it was violative of the Constitution of the United States, apparently, as said by the Court:

> "overlooking that, even without diversity of citizenship (and there was none), if the bill presented a substantial controversy under the Constitution of the United States and the requisite amount was involved, the jurisdiction extended to the determination of all questions, including questions of state law, and irrespective of the disposition made of the Federal questions. *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 508, 61 L. Ed. 1280, 1285."

Section 2 of Article III of the Constitution provides that

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, * * *."

The Judicial Code (Section 24) as amended by Act of March 3, 1911, c. 231, section 24, 36 Stat. 1091, 28 U. S. C. A., sec. 41, page 32, confers upon District Courts jurisdiction over suits

> "where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, * * *."

The effect of the decision of the Circuit Court of Appeals, if affirmed, would be to destroy the jurisdiction thus conferred and to prevent resort to the Federal Courts in any case where a question of general or state law, as well as a Federal question, is present, and require all such litigants to proceed in the State Courts if in any doubt as to

the way in which the issues of fact or law involved in the Federal question may be decided. This is in effect saying that, despite the broad powers conferred both by the Constitution and the Judicial Code, and the interpretation heretofore given by this Court in the *Siler* and other cases, the Federal Courts are without jurisdiction to determine any questions other than those of Federal law, where jurisdiction is invoked solely on the ground of the existence of a Federal question. This necessarily follows, for, if the Federal question is determined in favor of the plaintiff, determination of the other questions becomes unnecessary except in that limited class of cases where their determination may be incidental to the relief afforded under the Federal question.

The class of cases affected by the limitation thus imposed by the Circuit Court of Appeals upon the jurisdiction of the Federal Courts is almost without number. A single illustration will suffice. For instance, in a case where the complainant brought suit to enjoin a sale of assets by one corporation to another on the ground that the State statute authorizing such sale or merger was unconstitutional under the Federal Constitution (diversity of citizenship being absent), and also upon the ground of fraud, if the Federal Court decided the constitutional question adversely to the complainant, it would be without power to determine the issues of law and fact raised by the allegations of fraud. Clearly, the determination of the latter would not be necessary to the determination of the former. As, clearly, if the Federal question were determined in favor of the plaintiffs, it would be unnecessary for the Court to determine the questions of general law involved in the other issues raised. Yet the relief to which the plaintiff would be entitled in

either case would be the same. Under the settled law, as declared by this Court, the Federal Court in such a case having obtained jurisdiction by reason of the existence of the Federal question presented, acquires jurisdiction to pass upon the questions of general law raised and may grant appropriate relief thereunder, even though the Federal question should be determined adversely to the plaintiff.

So in this case. Indeed, in a case of this character there is an added reason why the doctrine of the *Siler* case should be applied. The acts sought to be enjoined were the same acts, whether violative of the Federal Anti-Trust Laws or only of the common law. In either case the injury sustained was the same. But a suit by an individual to enjoin a violation under the Anti-Trust Laws may be brought only in the Federal Courts. §15 *Clayton Act,* 38 Stat. 731, Title 15, U. S. C. A., Sec. 15, page 167. *General Investment Co.* v. *Lake Shore & M. S. Ry. Co.,* 269 Fed. 235 (C. C. A., 6th). The plaintiffs could not, therefore, if they had resorted to the State Courts, have invoked the Federal Anti-Trust Laws as a basis of relief. Only in the Federal Court could both grounds of relief against the commission of the same acts be invoked. The effect of the decision of the Circuit Court of Appeals, therefore, is to say that the plaintiffs would be compelled to abandon one or the other of the grounds of relief relied on by suing in the Federal Court for relief under the Sherman Act only or in the State Court for relief from a common law conspiracy only, or, in the alternative, that the plaintiffs should have proceeded simultaneously to obtain relief from the same acts in both courts. Neither the Constitution, the Judicial Code, nor the decisions of this Court so limit the jurisdiction of the Federal Courts, where a Federal question—not frivo-

lous—is raised, so as to produce any such incongruous result. The Master in the District Court held that, although the acts complained of did not violate the Anti-Trust Laws, because they did not directly interfere with interstate commerce (a decision which, it is respectfully submitted, is erroneous), the same acts were unlawful because committed in furtherance of a common law conspiracy, and on that account should be enjoined. The Court had jurisdiction to determine this question, and upon the basis of the determination made, to make the decree entered.

Elgin Watch Co. v. *Illinois Watch Co.*, 179 U. S. 665, 45 L. Ed. 365, and the cases following it, upon which the Circuit Court of Appeals relied, are all cases involving trademark infringement, a field of the law in which many doctrines peculiar to that field alone have been laid down. Whatever the precise basis of the decision in that and kindred cases may be, they clearly do not limit and were not intended to limit the doctrine of the *Siler* case, decided eight years later, or to oust the jurisdiction of the Federal Court once obtained to determine all questions of fact and law, however the Federal question upon which such jurisdiction was invoked may be determined.

Upon principle I submit there can be no distinction between a case where the same act is alleged to be in violation of the Federal constitution and statute and also in violation of the statute, constitution or public policy of a state (the *Siler* and other cases), and the case at bar where the same set of acts is claimed to be in violation of a Federal statute and also of the State law and the general law.

If, in the first case, the Federal question being decided adversely to the plaintiff, still the Court retains jurisdiction to decide the merits of the local question, I submit that the same result must follow in the second and that cases

similar to that at bar as *People's Savings Bank* v. *Layman*, 134 Fed. 635, were properly decided.

The two lines of cases in this court illustrated by the *Siler* case and the *Elgin Watch Co.* case may be reconciled in the manner indicated by Judge Denison in *Vogue* v. *Vogue Hat Co.*, Circuit Court of Appeals, 6th Circuit, 12 Fed. (2d) 991, at page 994, without destroying the principle of the *Siler* case. He states three considerations and comes to the conclusion that the most tenable ground of distinction is that in a patent unfair competition case the plaintiff must show the existence of a valid patent. In other words, he must show his title. If he does not show his title, then he is out. The Court has no jurisdiction to proceed with the case until the title of the plaintiff is made out, to wit, by showing a valid patent. If he fails to show a valid patent, then the Court need not and perhaps cannot go further.

It might be argued that this principle would apply here if plaintiffs had not shown that they were in fact engaged in interstate commerce. It might be said that such a showing was as necessary to establish their "title" to seek relief under the Federal statute as the showing of a valid patent is necessary in a patent case. But it is not necessary to consider that question for it is conceded that plaintiffs were engaged in interstate commerce. Having shown that fact, plaintiffs then are in the same position as were the plaintiffs in the *Siler* and other cases in which it was alleged that the same set of acts was a violation of plaintiffs' rights under both Federal and local law.

Judge Denison applied this distinction in the Vogue case and held in that inasmuch as a valid trade mark had been shown, the Court had jurisdiction under the Elgin

case and, although it then determined that there was no infringement of that valid trade mark it might grant relief upon the ground that the same acts claimed to have constituted the infringement of the trade mark constituted unfair competition.

In the case at bar the same acts claimed to give plaintiffs the right to relief under the Federal statute were also claimed to give the right to the plaintiffs to relief under the state law and public policy and general law.

The Siler case, as interpreted by Judge Denison, is in accord with the general rule with respect to jurisdiction stated by this Court in *Pacific Electric R. Co.* v. *Los Angeles*, 194 U. S. 112, 48 L. Ed. 896, at page 899, as follows:

> "In those cases the question of jurisdiction was presented on motion to dismiss. In the case at bar it is presented by demurrer; but, however presented, jurisdiction depends primarily upon the allegations of the bill, not upon the facts as they may subsequently turn out. City Railway Co. *v.* Citizens' Street R. Co., 166 U. S. 557, 41 L. Ed. 1114, 17 Sup. Ct. Rep. 653. Nor upon the actual sufficiency, in the opinion of the court, of the facts alleged to justify the relief prayed for. We do not mean, however, that a mere claim in words is sufficient; a substantial controversy must be presented. This requirement is satisfied in the case at bar. The circuit court, therefore, had jurisdiction, and the case was properly brought here from that court, since it involves the construction and application of the Constitution of the United States."

And in *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 68 L. Ed. 308, at page 314, in speaking of the matter of Federal jurisdiction, upon a claim under the Constitution and Laws

of the United States, which would permit a direct appeal to the Supreme Court, this Court in an opinion by Mr. Justice Sutherland, said:

> "Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact. A complaint setting forth a substantial claim under a Federal statute presents a case within the jurisdiction of the court as a Federal court; and *this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven.* Its decision either way, upon either question, is predicated upon the existence of jurisdiction, not upon the absence of it. Jurisdiction, as distinguished from merits, is wanting only where the claim set forth in the complaint is so *unsubstantial as to be frivolous; or, in other words, is plainly without color of merit.*"

Even if the rule announced by the Circuit Court of Appeals for the 2nd Circuit in the case at bar, to wit, that it is only where it is necessary for the Federal Court to determine the local question to ascertain whether the plaintiffs should have relief upon the Federal question that the Court has the right to proceed having decided the Federal question adversely to plaintiff, this case is within that rule because it was necessary for the District Court to consider all of the acts of the parties, the testimony with respect to which is contained in a book of upwards of 2000 pages, before it could reach a conclusion as to whether those acts were such as that plaintiffs were entitled to a remedy under the Federal statute and in so determining the Court

was obliged to reach a conclusion as to whether those acts would violate plaintiffs' rights under the general law.

But I submit that that is not a proper ground of distinction and that the only workable ground of distinction which will permit the doctrine of the Siler case to have any play whatever is that indicated by Judge Denison in the Vogue case. The Circuit Court of Appeals for the Sixth Circuit in *Automotive Products Corporation* v. *Wolverine Bumper & Specialty Co.*, 15 Fed. (2d) 745, at page 747, cited its own opinion in the Vogue case.

This Court denied certiorari in the Vogue case, 273 U. S. 706, 71 L. Ed. 850.

The Vogue case was followed in *Hutto Engineering Co. Inc.* v. *Grinder Sales Co.* (District Court, Eastern District of Michigan), 18 Fed. (2nd) 981.

Conclusion.

It is respectfully submitted that the Circuit Court of Appeals for the Second Circuit was in error in holding that the District Court had no jurisdiction to make the decree which it did and that the decree of the United States Circuit Court should be reversed.

Respectfully submitted,

MERRITT LANE,
Of Counsel,
Petitioner.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 423

LEVERING & GARRIGUES COMPANY, *et als.*,
Petitioners,

against

PAUL J. MORRIN, individually and as President of International Association of Bridge, Structural and Ornamental Iron Workers, *et als.*,
Respondents.

BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FRANK P. WALSH,
Attorney for Respondents.

Of Counsel:
JOHN WALSH,
HAROLD STERN.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No.....

LEVERING & GARRIGUES COMPANY, *et als.*,
Petitioners,

vs.

PAUL J. MORRIN, individually and as President of International Association of Bridge, Structural and Ornamental Iron Workers, *et als.*,
Respondents.

BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Counsel for the petitioners rely upon two grounds for granting of the writ of certiorari:

FIRST: That the Circuit Court of Appeals erred in holding that averments with respect to citizenship of voluntary labor associations were insufficient in that jurisdiction based upon diversity of citizenship over voluntary labor

associations depends upon the individual citizenship-residence of their members.

SECOND: That the Circuit Court of Appeals erred in holding that the mere assertion of claim for relief upon a Federal ground, which had been determined adversely, did not give jurisdiction to the District Court in the instant case to pass upon separate and independent questions of which it would have no jurisdiction, except for the claim based on Federal constitution or statute.

Statement of Facts.

The factual statement of the case contained in the petition for the writ of certiorari (paragraphs 1 to 7, pp. 1 to 8) is substantially correct and adopted by respondents herein for the purposes of their argument.

The interpretation and construction placed upon those cases cited in that part of the petition adopted as the petitioners' statement of the case, is denied.

ARGUMENT.

A.

The jurisdictional averment in petitioners' bill of complaint with respect to the association-respondents herein, is not an allegation sufficient to establish the requisite diversity of citizenship to confer jurisdiction on the Federal Court.

The diversity of citizenship clause, which claims jurisdiction in the instant case, requires that the plaintiffs and the defendants must be citizens and residents of different

states; therefore, the jurisdiction of the District Court over the association-respondents herein, depends on the fact whether or not they are citizens of New York and Missouri within the meaning of the term.

It has been repeatedly held in a long line of cases that an unincorporated society, company or association, has no corporate entity and cannot be sued as such but that for jurisdictional purposes its citizenship is dependent upon its members and unless it is affirmatively alleged or shown that the citizenship of each member is different from that of each plaintiff jurisdiction will not lie.

Great Southern Fire Proof Hotel Co. v. *Jones,* 177 U. S. 449, 20 S. Ct. 690; 44 L. Ed. 84;

Thomas v. *Ohio State University,* 195 U. S. 207, 25 S. Ct. 24, 49 L. Ed. 160;

Coyle v. *Duncan Spangler Coal Co.* (D. C.) 288 Fed. 897, 903;

Brown v. *Protestant-Episcopal Church* (D. C.) 8 Fed. (2nd ed.) 149, 150;

Wise v. *Brotherhood of Locomotive Engineers F. & E.,* 252 Fed. 961;

Irving et al. v. *Joint District Council of New York and Vicinity of United Brotherhood of Carpenters and Joiners of America and Amalgamated Society of America and Joiners of America, et al.,* 180 Fed. 896, 898;

Russell v. *Central Labor Union,* 1 Fed. (2nd ed.) 412;

Beavers v. *McMillan, et al.,* 44 Fed. Rep. (2nd ed.) 668.

Unincorporated societies, companies and associations not having the status of citizenship, those seeking redress against them for alleged violation of general, local or state laws, cannot invoke the jurisdiction of the Federal Courts, by way of diversity of citizenship by suing in their names or through their officers.

The association-respondents herein being voluntary labor associations and not having any corporate entity, as such, the Circuit Court of Appeals properly denied jurisdiction of them under the diversity of citizenship clause.

I.

The reasoning of the petitioners herein that under Federal Law voluntary labor associations are to be considered residents of the state in which they have their recognized headquarters, irrespective of the residence of their members, is without force and should not be considered.

This contention is predicated upon the reasoning contained in those cases out of which flowed the presumptive citizenship of corporators or stockholders of a corporation.

There is no place of residence or citizenship that can be legally ascribed to a voluntary labor association in order to presume the citizenship of their members for the purposes of federal jurisdiction, in the absence of statutory or constitutional provision; nor can citizenship be inferred from the fact in the instant case that the respondent-associations, the International Association and the three local associations had their headquarters at St. Louis, Missouri, and New York City, respectively.

A corporation's citizenship is determined not by where it has its principal office but by the fact of its incorporation in a particular state. The Federal presumption that the citizenship of the corporators or stockholders of a corporation is presumed to be that of the corporation, is not determinative of the contention made here. The rule or presumption attaches to an actual legal entity created and brought into legal existence by the laws of a particular state, as such, which is the fundamental factor in determining Federal jurisdiction on account of diversity of citizenship involving corporations.

If the presumption is to be indulged in here, where is the citizenship of the association, for the presumption follows citizenship, and not residence.

As the Circuit Court of Appeals aptly pointed out, the decision rendered in *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344, 60 L. Ed. 975, at page 984, is in nowise applicable to the issue raised herein.

In the Coronado case the Court was called upon to determine the violation of Federal Laws, namely, the Anti-Trust Laws, and held that the provision contained therein permitting associations to be sued in their own name or through their officers included voluntary labor associations. That the departure, if it could be called such, was merely procedural and did not enlarge the jurisdiction of the Federal Courts to hear matters arising under general laws or local statutes where its jurisdiction was invoked by way of diversity of citizenship.

There is nothing at variance with the logic or justice of the Circuit Court of Appeals' ruling in the instant case and this Court in the Coronado case. Convenience, justice and even necessity in matters procedural could re-

quire the necessity for a statute permitting these labor associations to be sued in their name, where the jurisdiction of the Federal Courts flows directly from the violation of a Federal right; but until by statutory or constitutional provision the status of these voluntary labor associations is changed, the Federal Courts are without jurisdiction over them;

Thomas v. *Board of Trustees,* 195 U. S. 207,

unless it affirmatively appears in the pleadings or from facts clearly proven that the citizenship and residence of all the members of a voluntary labor association is different from that of the citizenship and residence of all the plaintiffs.

Keeping in mind that the Federal presumption or rule with respect to the citizenship of stockholders or corporators of a corporation attaches to the legal status of a corporation, created as such by a specific state, and that no such status can be ascribed to a voluntary labor association, then the numerous cases cited by petitioner tracing the history and origination of the rule, becomes a mere treatise on the subject and in nowise definitive of the issue presented.

II.

Procedural defects in determining jurisdiction may be waived, but inherent defects never.

Your petitioners contend that because the allegations of the bill, with reference to the citizenship and residence of the respondent-associations, not having been denied by the answer and the jurisdiction being acquiesced in by respondents throughout the case, that the Circuit Court of Appeals, in effect, is estopped from denying jurisdiction on the questions of diversity of citizenship.

They cite, to support their contention, *Thronateeska Pecan Co.* v. *Mathews,* Circuit Court of Appeals, Fifth Circuit, 277 Fed. 361, at page 365, and Equity Rule No. 30.

Equity Rule No. 30, of course, is bottomed on the presumption that the defendant is capable of being sued.

The Thronateeska case is not applicable to the present situation. Mathews, the defendant, was a natural person, capable of citizenship and residence, and if the allegation with reference to the same in the bill of complaint was not properly denied, then Equity Rule No. 30 applies and the allegation stands confessed.

Petitioners overlooked the distinction herein that the defect in the jurisdiction is inherent and not procedural and can never be waived. Jurisdiction cannot be conferred by consent or the failure of the parties to raise the question in the trial court.

Minn. vs. *Northern Sec. Co.,* 194 U. S. 48, 24 Sup. Ct. 598, 48 L. Ed. 870;

Great Southern Hotel Co. vs. *Jones,* 177 U. S. 449, 20 Sup. Ct. 690, 44 L. Ed. 842.

III.

The contention that because voluntary labor associations can be sued in the States of New York and Missouri they should be treated as legal entities for purposes of Federal jurisdiction, is erroneous.

The citizenship of a voluntary association cannot be said to be in those states, which by statute, permit the bringing of suits by or against an association in its name or the name of its officers, for the reason that the citizenship of all the respondent-associations herein would be co-extensive with every state that permits the practice.

If petitioners' contention is correct, the citizenship of the International Association might well be ascribed to be that of the State of New York because the International Association, under the laws of the State of New York, which are purely procedural, permits it to sue or be sued; and this is likewise true if the local respondent associations sought redress in the Courts of Missouri. They would be recognized there for that purpose alone, but because of that their citizenship could not be ascribed to the State of Missouri.

The cases cited by petitioner under their Point III, has no application here; rather they tend to prove the contention of respondents that, in the absence of statutory or constitutional provision, voluntary labor associations cannot be sued on diversity of citizenship in their names or by their officers.

Petitioners cite *U. S.* v. *Adams Express Co.*, 229 U. S. 381; 57 L. Ed. 1237, as a case sustaining their contention. The jurisdiction of the Court over the Adams Express Co.

case, a joint stock association, was on account of the violation of a statute, which gave jurisdiction over express companies for a violation of its provisions.

The jurisdiction invoked in *Duplex Printing Co.* v. *Deering,* 254 U. S. 443, 65 L. Ed. 349, cited by petitioners involved a violation of the Anti-Trust Act, which permits the suing of voluntary labor associations in their name and through their officers and involving a Federal right; diversity of citizenship was not in question.

B.

The mere assertion by petitioners of a claim for relief upon a Federal ground, which has been determined adversely, does not give jurisdiction to the District Court to pass upon questions of which it would have no jurisdiction, except for the claim based on Federal constitution or statute.

In the case before the Court petitioners asserted two independent causes of action. Primarily, jurisdiction was invoked on diversity of citizenship for the violation of certain alleged rights not founded on Federal statute or constitution, and, secondly, they allege interference with interstate commerce with the apparent right to sue under the Federal Anti-Trust Statute. They asserted a third claim based upon alleged violation of constitutional rights but which proved so unsubstantial that petitioners saw fit to stand on the first two.

In all the cases cited by petitioners to sustain their contention, in substance, that a jurisdiction once acquired extends to all questions in a case, cited and flowing from the principle laid down in *Siler* v. *Louisville National R. R. Co.,*

213 U. S. 175, there is not one principle announced that is out of harmony with the learned reasoning of the Circuit Court of Appeals and the position it takes in deciding the point.

It would be wasting the time of this Court to go into a discussion of the cases cited in the learned Court's opinion. All cases applicable to the situation and those claimed in conflict with its opinion have thoroughly been discussed and harmonized.

The Circuit Court of Appeals properly ruled that the mere assertion of a claim for relief upon a Federal ground, which has been determined adversely, did not give jurisdiction to the District Court to pass upon questions of which it would have no jurisdiction, except for the claim based on Federal Constitution or Statute.

We submit that the decision of the Circuit Court of Appeals is clearly correct and respectfully urge that the petition for the writ of certiorari be denied.

Respectfully submitted,

FRANK P. WALSH,
Attorney for Respondents.

Of counsel:

JOHN WALSH,
HAROLD STERN.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 423.

LEVERING & GARRIGUES COMPANY, HEDDEN IRON CONSTRUCTION COMPANY, McCLINTIC-MARSHALL COMPANY, *et al.*,

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Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION.

FRANK P. WALSH,
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Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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BRIEF FOR RESPONDENTS IN OPPOSITION.

Statement of Case.

Prior to July 24, 1924, and likewise prior to the 11th day of March, 1925, the date upon which this action was commenced in the United States District Court for the Southern District of New York, an action was started in the Supreme Court of the State of New York, New York County, by a group of plaintiffs numbering fourteen, which

included the petitioners in the present action, seeking, among other things, a preliminary injunction restraining the defendants from certain acts. Their application was denied by Mr. Justice Lydon on the 24th day of July, 1924.

The defendants in the action brought in the State Court were almost identical with the respondents in the present action.

The parties plaintiffs in the State action and the petitioners in the present action were at that time all members of the Iron League of New York and, as such, in point of interest, were vitally concerned with the results of both actions (See defendants' answer, paragraph 29, p. 36, Transcript of Record).

The issues raised were, in substance, identical in both actions and predicated upon the same controversy, namely, disputes connected with the operations in the same industry, in the same city and locality, involving on the part of the plaintiffs-petitioners in both actions the same ultimate purpose.

The only variation between the complaints filed in the State Court and the Federal Court was the additional allegations of boycott in the complaint filed in the Federal Court being a necessary allegation upon which to invoke jurisdiction for the alleged violation of the Anti-Trust Laws (see defendants' answer, paragraph 30, pp. 36, 37, 38, 39, 40 and 41, Transcript of Record).

The complaint filed in the Federal Court invoked jurisdiction on three grounds:

1. Diversity of citizenship;
2. Interference with interstate commerce; and
3. Alleged violation of constitutional rights.

The second and third allegations of jurisdictional facts were denied in paragraphs 19 and 21 of defendants' answer (pp. 31, 32, Transcript of Record), and the good faith of the entire proceeding challenged in paragraphs 23 to 30 inclusive of defendants' answer (pp. 33 to 40 inclusive, Transcript of Record).

Upon the filing of the bill of complaint in the present action a temporary order of injunction was entered restraining respondents from performing the acts complained of pending a final hearing.

Subsequently, and by consent, an order of reference was made to a Master, who after hearing the testimony, which was offered only by the plaintiffs-petitioners herein, found that petitioners *were not entitled* to relief under the Anti-Trust Laws, but recommended a Decree for injunction on the alleged violation of those rights of petitioners, which were purely local in character and dependent upon diversity of citizenship for jurisdiction.

As there was no testimony offered by respondents to controvert the evidence offered on the part of petitioners to sustain their claim of a violation of interstate commerce, the effect of the Referee's ruling, taking the evidence as offered to be admitted, in substance, was that there had never been substantial or colorful basis for the allegation in the complaint that defendants-respondents had violated the Anti-Trust Laws.

Of his ruling on denying petitioners' claim for relief under the Anti-Trust Laws, the Referee, in his report and decision, held:

> "Plaintiffs' contention that the conduct of defendants constitutes an unlawful interference with interstate commerce is based upon the fact that in

some cases sub-contracts include the fabrication in other states of steel to be shipped into and erected in New York. It is insisted that such contracts are interstate in character because contemplating the interstate shipment of steel in their performance, and that the erection of the steel so shipped is an inseparable part of an interstate transaction which must be treated as a whole. By preventing them from getting such sub-contracts, plaintiffs assert, defendants are preventing the shipment of steel into the state.

"There is no evidence showing the precise method or process of erecting steel; but it is common knowledge that it requires local labor and erecting equipment and machinery; also that each piece of fabricated steel ultimately becomes an integral part of the building.

"Under these circumstances the work of erecting steel must be regarded as merely local, and as constituting no part of an interstate transaction (General Railway Signal Co. *v.* Virginia, 246 U. S. 500, 62 L. Ed. 854; Browning *v.* Waycross, 233 U. S. 16, 58 L. Ed. 828; Kansas Steel Co. *v.* Arkansas, 269 U. S. 148, 70 L. Ed. 204); and interference with such work, by strikes or otherwise, would not amount to interference with interstate commerce.

"The facts do not bring this case within the doctrine of those decisions dealing with machines, such as a printing press or ice plant, shipped into a state in parts to be there assembled and erected by skilled labor and tested before delivery (York Manufacturing Co. *v.* Calley, 247 U. S. 21, 62 L. Ed. 963).

"Moreover, there was here no intent or purpose to interfere with interstate commerce. Defendants' ultimate object was to compel plaintiffs to submit to the closed shop policy or suffer the consequences in loss of contracts. Any reduction in the amount

> of fabricated steel shipped into the state resulting from the success of defendants' endeavors to prevent plaintiffs from getting subcontracts, would be merely an incidental injury, if any, to interstate trade. Plaintiffs' steel was not condemned as unfair. Interference with its movement was not defendants' primary aim. Consequently there was no actionable interference with interstate commerce (Bedford Cut Stone Co. *v.* Journeymen S. C. Assn., 274 U. S. 37, 71 L. Ed. 916; Industrial Assn. of San Francisco *v.* United States, 268 U. S. 64, 69 L. Ed. 54)."

On February 14, 1930, a final decree was entered (p. 96, Transcript of Record). Respondents thereupon appealed to the Circuit Court of Appeals for the Second Circuit.

Petitioners did not see fit to appeal from said part of Referee's Report and Decision, nor from the final decree overruling their exceptions thereto, which denied their claims of interference with interstate commerce.

Upon the hearing on respondents' appeal in the Circuit Court of Appeals, despite the fact that petitioners had not appealed from said portion of the Referee's Report and Decision denying them relief on the ground of an alleged violation of the Anti-Trust Laws, or from the decree overruling their exceptions thereto, petitioners briefed the point, saying:

> "The decree below may be sustained upon the ground that appellants were engaged in a conspiracy in restraint of interstate trade."

Thereafter the Circuit Court of Appeals directed a reargument upon the question as to whether:

> 1. "Is the allegation in the complaint with respect to which of the local unions named as defend-

ants, that it is a 'resident, citizen and inhabitant of the State of New York' a sufficient averment of diversity of citizenship between the plaintiffs and such local unions or its members.

2. "If there is no allegation or proof that the members of the local union named as defendants are citizens of states other than New Jersey and Pennsylvania, what judgment should this Court enter?"

The case was reargued and petitioners contended that the allegations of the bill as to diversity of citizenship were sufficient. In addition, they again injected into the argument the point at issue here, namely, that irrespective of diversity of citizenship, the Court had jurisdiction because of the charge in the bill that respondents were engaged in a conspiracy in restraint of trade and that, although the Federal question was decided adversely to plaintiffs-petitioners, the District Court did not lose jurisdiction and might proceed to final decree upon the local questions involved.

The Circuit Court of Appeals, thereafter and upon August 30, 1932 (p. 100, Transcript of Record), held that the allegations of the bill as to the residences of the unions were not sufficient and that the mere assertion by petitioners of a claim for relief upon a Federal ground, which had been determined adversely, did not give jurisdiction to the District Court to pass upon questions of which it would have no jurisdiction, except for the claim based on Federal Constitution or statute, and remanded the case to the District Court with directions (see Opinion, p. 100, Transcript of Record).

The Court, in its opinion, although not resting its decision upon the point discussed, questioned the good faith,

substantiality and colorability of petitioners asserted claim for violation of its rights under the Anti-Trust Laws.

Thereafter, upon application made, this Court granted a writ of certiorari "limited to the question of Federal Jurisdiction other than questions relating to diversity of citizenship."

POINT I.

The mere assertion by plaintiffs-appellants of a claim for relief upon a Federal ground which has been determined adversely does not give jurisdiction to the District Court to pass upon questions of which it would have no jurisdiction except for the claim based on Federal Constitution or Statute.

In considering this point, the Court will have in mind that the respondents-defendants stood upon the testimony and evidence offered by petitioners-plaintiffs in support of the alleged violation of the Anti-Trust Laws. The defendants-respondents offering no testimony on this contention. The Referee in denying relief on this ground based his finding on the insufficiency of the proof offered and not upon controverted facts.

The ruling, therefore, was not an adverse determination of a controverted fact, but an adverse legal ruling to petitioners-plaintiffs' claim that there had existed a substantial or colorful basis for their allegation in the complaint that defendants-respondents had violated the Anti-Trust Laws.

In the matters presently before the Court for its consideration in determining the questions involved, the plaintiffs-petitioners asserted two causes of action.

Primarily they assertedly invoked the jurisdiction of the Circuit Court on diversity of citizenship for the violation of certain alleged rights not founded on Federal Statute or Constitution and purely local in character. In addition, plaintiffs-petitioners alleged interference with interstate commerce with the apparent right to sue under the Federal Anti-Trust Laws. They likewise asserted a third claim based upon alleged violation of constitutional rights, which they abandoned.

The learned Circuit Court of Appeals, in denying under certain situations the claim that a jurisdiction once acquired ran to all matters of a controversy, followed this Court's opinion many times asserted in *Elgin Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665, 667, and *Leschen Rope Co.* v. *Broderick*, 201 U. S. 166, and kindred cases, rather than the ruling in *Siler* v. *Louisville & Nashville Railroad Co.*, 213 U. S. 175, at p. 191, but pointed out that its application of the *Elgin* case and *Leschen* case, *supra*, to the present situation was not to deny the doctrine laid down in the *Siler* case, but rather to harmonize the same.

Accordingly, the Court construed the *Siler* case to mean that when a Federal Court assumes to decide a local question where its jurisdiction was primarily invoked by an alleged violation of Federal Statute or Constitution the judication of the local question must be necessary to a proper determination of the Federal question involved. Continuing the Court construes the *Elgin* and *Leschen* cases to mean that where the judication of the local question is not determinative of the federal right involved and diversity of citizenship is not present and the Federal question fails, then the Court is lacking in jurisdiction to decide the local question.

In other words, there are two situations which might arise in determining the doctrine applicable to situations of this kind involving local questions.

The learned Court of Appeals found that the facts involved in the present controversy were different in jurisdictional significance than ruled upon in the *Siler* case. To say that the decision itself controverts or, in any sense, contradicts the *Siler* case is to say that the Supreme Court reversed the *Siler* case by the subsequent decisions in the *Elgin, Leschen* and similar cases.

Plaintiff-petitioners place great stress on *Vogue Co.* v. *Vogue Hat Co.*, 12 Fed. (2nd Series) 991, C. C. A. 6, and *General Investment Co.* v. *Lake Shore, etc., Railway Co.*, 260 U. S. 261, as sustaining their position.

Judge Swan, writing the opinion for the Circuit Court of Appeals in the instant case, very clearly and logically points out that his present view does not stand against the *General Investment Co.* case, *supra*, as follows:

> "In *General Investment Co.* v. *Lake Shore, etc., Railway Co.*, 260 U. S. 261, there were as here two causes of action, one, under the Anti-Trust Laws, the other, under the State law. There was federal jurisdiction over the second because of diverse citizenship. The Supreme Court did not suggest that the jurisdiction over the second rested upon that over the first. Its decision at most goes no further than that a cause of action between diverse citizens would follow into the District Court a cause of action arising under laws of the United States when the removal was upon the second ground alone. That is quite another question from the substantive jurisdiction over the second cause of action; moreover, the Supreme Court actually disposed of the second cause of action on the merits, while dismissing the

first for lack of jurisdiction. Obviously, therefore, however the second got into the District Court, the power to adjudicate upon it could not be ancillary to jurisdiction over the first. Judge Denison, anticipating his view expressed in *Vogue Co.* v. *Vogue Hat Co., supra,* did invoke the *Siler* case, but even then as a *dictum* because he thought that federal jurisdiction existed quite independently (269 F. 235, 241), just as the Supreme Court did. The case does not, therefore, stand against our view. It is confirmed, moreover, by the language of Mr. Justice Holmes in *Stark Bros. Co.* v. *Stark,* 255 U. S. 50, 51." (See Judge Swan's opinion, pp. 106, 107, Transcript of Record).

Accordingly, petitioners must rest on the doctrine laid down in *Vogue Co.* v. *Vogue Hat Co.,* 12 Fed. (2nd Series) 991, C. C. A. 6. It is respondent's contention that irrespective of how the abstract proposition of law involved here is determined, petitioners do not meet the first requirement of that case and, therefore, cannot sustain their position in any event.

The doctrine laid down in the *Vogue* case, *supra,* by Judge Denison requires the determination of the validity of the trade mark before the Court would have jurisdiction to decide the local question involved, namely, unfair competition. This requirement goes beyond the mere assertion in the pleadings of the validity of a trade mark and of necessity requires submission of proof thereunder in order to determine the actual fact.

This being so, the *Vogue Co.* case, *supra,* is an authority for consideration of the matters involved here rather than in conflict with Judge Swan's opinion; otherwise, the mere assertion of the validity of the trade mark would give juris-

diction no matter whether it was subsequently decided that the trade mark was invalid. To determine the validity of a trade mark necessitates a submission of proof sustaining the claim as was done in this case when the Referee after hearing the uncontroverted testimony of petitioners-plaintiffs on the alleged violation of interstate commerce ruled, as a matter of law, that the proof was insufficient to sustain the charge.

It is not our conception of the law that an adroit pleader can so frame his bill as to make it impregnable against demur for insufficiency and then when the charge is heard appears unsubstantial in every respect that a Federal Court can then inquire into a purely local question by virtue of a jurisdiction flowing through the claim, which has been adversely decided against the complainant upon their own evidence; the defendants having offered no evidence whatever upon said contention. If this were so jurisdiction could be conferred by the pleader upon himself making nugatory the laws and statutes governing the same.

That this effort was made in the instant case cannot be denied, as relief was first sought for under State jurisdiction with a number of parties made plaintiffs, whose residences and citizenships were stated to be the same as several of the defendants and defendant associations named.

In the instant case, the preliminary injunction sought for was denied in the State Court. Subsequently, the identical bill, in substance, was filed in the Southern District of New York, eliminating those plaintiffs who, on the face of the complaint in the State Court, had the same residence and citizenship of the several defendants herein (as alleged in paragraph 19, defendants' answer, p. 31, Transcript of Record), and including the additional charge of

boycott so that petitioners-plaintiffs could apparently invoke the jurisdiction of the Circuit Court on grounds of diversity of citizenship and under the Anti-Trust Laws.

It must be conceded under the circumstances since petitioners failed to appeal from the denial of relief under the Anti-Trust Laws, and particularly the urgency with which they stressed their claim of diversity of citizenship when challenged not only in the Circuit Court of Appeals, but likewise in their application for certiorari to this court, that that was their substantial claim for jurisdiction and not until such time as that particular phase of the jurisdiction was denied them did they seriously employ the devious attempt to apply the *Vogue Co.* case, *supra,* to the present situation.

Accordingly, even if the *Vogue Co.* case, *supra,* is concluded to be determinative of the abstract principles of law involved here, it still fails to sustain the position of petitioners. To hold that it does would necessitate the rejection of the first and vital requirement of the doctrine laid down by Judge Denison in that case, namely, the determination of the validity of the trade mark. That requirement as applied to the situation in controversy was met by the determination of the Referee in denying as a matter of law the relief sought under the Anti-Trust Laws and, in accordance with the *Vogue Co.* case, closed that door as a medium of jurisdiction to decide the purely local question involved.

The *Vogue Co.* case, *supra,* as applied to our situation merely follows the long established doctrine as laid down in *Minnesota* v. *Northern Security Co.,* 194 U. S. 48, 24 S. Ct. Rep. 598, 48 L. Ed. 870, as cited in *Noyes* v. *Parsons,* 245 Fed., at page 694:

> " 'An allegation in a complaint filed in a Circuit Court of the United States may, indeed, in a sense confer jurisdiction to determine whether the case is of the class of which the court may properly take cognizance for purposes of a final decree on the merits. Newburyport Water Co. *v.* Newburyport, 193 U. S. 561, 24 Sup. Ct. 553, 48 L. Ed. 795, and Pacific Electric Ry. Co. *v.* Los Angeles, 194 U. S. 112, 24 Sup. St. 586, 48 L. Ed. 896, decided at present term. But if, notwithstanding such an allegation, the court finds, at any time, that the case does not really and substantially involve a dispute or controversy within its jurisdiction, then, by the express command of the act of 1875, its duty is to proceed no further'—citing section 5 of the act of 1875 (Act March 3, 1875, c. 137, 18 Stat. 472 (Comp. Stat. 1916, Sec. 1019)."

This holds that of necessity an allegation might confer in a sense limited jurisdiction to determine the substantiality (validity as in *Vogue* case) of the claim, and once it arrives at an adverse determination its jurisdiction ceases for all purposes in connection therewith, as though the allegation had never been made.

This being true and the claim of diversity of citizenship having been eliminated from the case, the Court properly ruled it had no jurisdiction to sustain the United States Circuit Court's disposition of the local question involved.

POINT II.

Irrespective of the determination of the questions raised under Point I, there are other considerations inseparably related to the question raised thereunder, which lead to the same determination made by the Circuit Court of Appeals in connection therewith and on account of which its said decree should not be disturbed.

A. The alleged claim of Federal Jurisdiction must be substantial and not frivolous.

(Minnesota *v.* Northern Security Co., 194 U. S. 48, 24 S. Ct. Rep. 598, 48 L. Ed. 870.)

It needs no citation of authority at length to sustain this familiar doctrine. Respondents submit that a consideration by the Court of the circumstances surrounding the inception of this litigation in the State Court, to its presence here, including the actions of petitioners before and after the Referee's denial of relief under the Anti-Trust Laws, and likewise the statements by Judge Swan in his opinion questioning the substantiality of their claim thereunder, can lead but to the conclusion that their claim bottomed on a violation of the Anti-Trust Laws was unsubstantial in every respect and used as a "makeweight" in their effort to submit to Federal jurisdiction.

Their additional claim for jurisdiction, namely, under the Constitution and Laws of the United States, is only additional evidence of their effort to conform to the requirements of Federal jurisdiction, which ground was confessedly unsubstantial by their abandonment of the same,

despite the fact that they originally asserted it with the same apparent seriousness and effect as the other two grounds upon which they claimed jurisdiction.

Respondents cannot agree with the statements throughout petitioners' brief that the Court did not hold the claims of petitioners under the Anti-Trust Laws were frivolous.

It is true that the Court did not rest its decision upon the particular question, but a great portion of the decision rendered by the Court discussed that very proposition and in no uncertain terms or significance.

Excerpts from the Court's opinion clearly indicate that belief:

> "There is neither allegation nor proof that the activities of the defendants were in any way motivated by a desire to restrain interstate trade of the plaintiffs" (See p. 103, Transcript of Record).
>
> "Even less can be said in support of the contention that constitutional rights of the plaintiffs were violated; indeed, this point was not even briefed upon this appeal" (See p. 104, Transcript of Record).
>
> "* * * ; and secondarily, and almost as a makeweight, they alleged interference with interstate commerce and apparently assert a right to sue under the Federal Anti-Trust Statutes. The additional claim of a violation of constitutional rights is so unsubstantial that no further mention of it is required" (See p. 107, Transcript of Record).
>
> "There is another consideration which might be urged as leading to the same result even if the *Siler* rule was held applicable. Concededly the alleged claim of federal jurisdiction must be substantial and not frivolous. *Minnesota* v. *Nor. Securities Co.*, 194 U. S. 48. In other words, a plaintiff may not base a claim for relief upon a federal ground which has

been authoritatively decided against him, and still demand that the Court pass upon other questions of which it would have no jurisdiction except for the claim based on federal constitution or statute. See *Bianchi* v. *Morales*, 262 U. S. 170, 172; *Niles-Bement-Pond Co.* v. *Iron Moulders Union*, 254 U. S. 77, 82; *Colonial Drug and Sales Co.* v. *Western Products Co.*, 54 F. (2nd) 216, 219 (C. C. A. 10); *Wallace Ranch Water Co.* v. *Rd. Commission*, 47 F. (2nd) 810 (C. C. A. 9); *Postal Tel. Cable Co.* v. *Nolan*, 240 F. 754, (D. Mont.); *Silvey* v. *Commissioners*, 273 F. 202, 207 (S. D. Ohio). It may well be doubted whether the plaintiffs' claim under the anti-trust laws could be deemed substantial. They urge that their bill was filed in March, 1925, and that the situation must be looked at as of the time rather than in the light of subsequent decisions. See *Boston Store* v. *Am. Graphophone Co.*, 246 U. S. 8, 26; *Mich. Central R. R. Co.* v. *Vreeland*, 227 U. S. 59, 63. We are inclined to believe that the question could not properly be thought doubtful even when the bill was filed, for the effect of an indirect incidental and remote interference with interstate commerce such as that alleged in the case at bar had already been considered in *United Mine Workers* v. *Coronado Co.*, 259 U. S. 344, 410, and *United Leather Workers* v. *Herkert*, 265 U. S. 457, as was pointed out in the *Industrial Association* case, 268 U. S. 64, 80; but we do not decide this point nor rest our decision upon it'' (pp. 107, 108, Transcript of Record).

Taking the above excerpts from the Court's opinion on the substantiality of the claim, together with the fact that petitioners' first sought relief in the State Court and failing there invoked the jurisdiction of the Federal Court, alleging three grounds:

A. Diversity of citizenship, which has been eliminated from consideration;

B. Violation of the Anti-Trust Laws, which was denied them on the basis of uncontroverted facts, as a matter of law;

C. On constitutional grounds, which they abandoned; is conclusive of the fact not only that their claims of jurisdiction, and particularly the one under question, was unsubstantial, but they obviously attempted to conform to the jurisdictional requirements of the Federal Court, rather than asserting *bona fide* and substantial jurisdictional claims thereunder.

Despite petitioners' contention now that the jurisdictional claim under the Anti-Trust Laws was substantial the most significant fact as indicating petitioners' own opinion as to the worth and substantiality of this claim was their failure to appeal when relief under it was denied, as a matter of law.

Accordingly, because of the foregoing, the Decree of the Circuit Court of Appeals should not be disturbed.

(B) In disposing of this matter the Court should likewise keep in mind the amendment to the Labor Law, namely, Public Act No. 65, approved March 23, 1932, and set forth thereunder as Chapter 6, Title 29, Sections 101 to 115 inclusive, U. S. C. A.

It is apparent from a reading of the present law that the restraint against the respondents in the present situation can no longer stand.

The acts upon which said restraint is predicated are declared to be legal acts within the meaning of the statute

and it expressly prohibits Federal Courts from issuing injunctions in similar cases declaring such action to be against the public policy of the United States.

As a consequence the questions involved herein are moot.

CONCLUSION.

It is respectfully submitted that the Circuit Court of Appeals for the Second Circuit did not err in holding that the District Court had no jurisdiction to make the decree which it did, and that the decree of the United States Circuit Court should be affirmed.

Respectfully submitted,

FRANK P. WALSH,
Attorney for Respondents.

Of Counsel:
JOHN WALSH,
HAROLD STERN.

SUPREME COURT OF THE UNITED STATES.

No. 423.—October Term, 1932.

Levering & Garrigues Company, Hedden Iron Construction Company, McClintic-Marshall Company, et al., Petitioners,
vs.
Paul J. Morrin, Individually and as President of International Association of Bridge, Structural and Ornamental Iron Workers, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 10, 1933.]

Mr. Justice Sutherland delivered the opinion of the Court.

This is a suit brought by petitioners against respondents in the federal district court for the southern district of New York to enjoin respondents from combining or conspiring to compel petitioners to employ, in their work of fabricating and erecting structural iron and steel, only members of a labor union, and to refrain from employing non-members; from conducting, inducing, or advising a boycott of petitioners; and from other enumerated acts. The bill invoked the jurisdiction of the federal court upon the ground of diversity of citizenship, and also upon the ground that acts complained of unlawfully interfered with interstate commerce and constituted a violation of the federal anti-trust acts. The case was sent to a referee, who, after a hearing, made a report and decision sustaining the charge of boycotting, but holding that the interference occasioned thereby was local in character and did not constitute an interference with interstate commerce. The report and decision were confirmed by the district court, and the bill dismissed as to certain of the respondents, and an injunction issued against others, the particulars of which, in the view we take of the case, it is not necessary to state.

The circuit court of appeals reversed the decree of the district court, holding that the allegations of the bill were insufficient to establish jurisdiction on the ground of diversity of citizenship,

and that the case having failed on the federal question, the court was without power to consider the nonfederal question because it was asserted in an independent cause of action. While resting its decision upon these considerations, that court expressed the further view that the allegations of the bill in respect of the claim of federal jurisdiction under the anti-trust acts were probably so unsubstantial as to disclose, on the face of the bill, a lack of federal jurisdiction. The district court was directed to dismiss the bill without prejudice for lack of jurisdiction unless amendments could be made to correct the defect in respect of diversity of citizenship. 61 F. (2d) 115. This court granted certiorari limited to the question of federal jurisdiction other than questions relating to diversity of citizenship.

The question of jurisdiction as thus limited is to be determined by the allegations of the bill, and not upon the facts as they may turn out, or by a decision of the merits. *Mosher* v. *Phoenix*, 287 U. S. 29, 30, and cases cited. Whether an objection that a bill or a complaint fails to state a case under a federal statute raises a question of jurisdiction or of merits is to be determined by the application of a well settled rule. If the bill or the complaint sets forth a substantial claim, a case is presented within the federal jurisdiction, however the court, upon consideration, may decide as to the legal sufficiency of the facts alleged to support the claim. But jurisdiction, as distinguished from merits, is wanting where the claim set forth in the pleading is plainly unsubstantial. The cases have stated the rule in a variety of ways, but all to that effect. See for example, *Mosher* v. *Phoenix, supra; Hull* v. *Burr*, 234 U. S. 712, 720; *Western Union Tel. Co.* v. *Ann Arbor R'd Co.*, 178 U. S. 239, 244; *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 305, *et seq.; South Covington Ry. Co.* v. *Newport*, 259 U. S. 97, 99; *Niles-Bement Co.* v. *Iron Moulders Union*, 254 U. S. 77, 82; *Catholic Missions* v. *Missoula County*, 200 U. S. 118, 130; *Newburyport Water Co.* v. *Newburyport*, 193 U. S. 561, 576. And the federal question averred may be plainly unsubstantial either because obviously without merit, or "because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." *Hannis Distilling Co.* v. *Baltimore*, 216 U. S. 285, 288; *McGilvra* v. *Ross*,

215 U. S. 70, 76-77, 80; *Norton* v. *Whiteside*, 239 U. S. 144, 153; *Bianchi* v. *Morales*, 262 U. S. 170; *State of Kansas* v. *Bradley*, 26 Fed. 289, 290; *Harris* v. *Rosenberger*, 145 Fed. 449, 452.

Passing, without inquiry, the first of these tests, a consideration of the decisions of this court rendered prior to the filing of the present bill demonstrates that the question is concluded by an application of the second test.

The prayer for relief primarily is based upon the averments that petitioners are engaged in fabricating and erecting structural iron and steel; that they are, and have been for a long time, operating in such business on the open shop method in relation to their employment of labor; that they have large contracts for the construction of work in the City of New York; that respondents are organizations of labor and officers and agents thereof; that by means and in ways which are set forth respondents have conspired, and are attempting, to compel petitioners and others to employ, exclusively union labor in their building operations; that in pursuance of the conspiracy respondents have called out on strike petitioners' union employees, and conducted boycotts, and undertaken other injurious interferences particularly set forth in the bill. These allegations conclude with the statement: "The sole purpose of the activities of the said defendants [respondents] is to compel a putting into effect the closed union shop in the industry of erecting structural iron and steel and inasmuch as this branch of the building industry is the only branch of the building industry where a person not a member of the labor union can secure employment if successful the entire building industry in the entire Metropolitan District will be closed union."

Following these allegations the bill contains averments to the effect that all the steel used by petitioners in the City of New York is transported from other states, being either bought or fabricated by petitioners in other states and transported to New York to be erected by petitioners therein; that the purpose and intent of respondents is to prevent the use of said steel therein, and wherever erected by petitioners; that the effect of the success of respondents would be, among other things, to destroy the interstate traffic of petitioners in steel. All this, however, is no more than to say that respondents' interference with the erection of the steel in New York will have the effect of interfering with the bringing of the steel from other states. Accepting the allegations of the bill at

their full value, it results that the sole aim of the conspiracy was to halt or suppress local building operations as a means of compelling the employment of union labor, not for the purpose of affecting the sale or transit of materials in interstate commerce. *Use* of the materials was purely a local matter, and the suppression thereof the result of the pursuit of a purely local aim. Restraint of interstate commerce was not an object of the conspiracy. Prevention of the local use was in no sense a means adopted to effect such a restraint. It is this exclusively local aim, and not the fortuitous and incidental effect upon interstate commerce, which gives character to the conspiracy. Compare *Bedford Co.* v. *Stone Cutters Assn.*, 274 U. S. 37, 46-47; *Anderson* v. *Shipowners Assn.*, 272 U. S. 359, 363-364. If thereby the shipment of steel in interstate commerce was curtailed, that result was incidental, indirect and remote, and, therefore, not within the anti-trust acts, as this court, prior to the filing of the present bill, had already held. *United Mine Workers* v. *Coronado Co.*, 259 U. S. 344, 410-411; *United Leather Workers* v. *Herkert*, 265 U. S. 457. The controlling application of these cases to the present one is apparent from the review of them in the later case of the *Industrial Ass'n* v. *United States*, 268 U. S. 64, 77-78, 80-82.

That case involved a combination on the part of building contractors and others to establish the "open shop" plan of employing labor by requiring builders who desired materials of certain kinds to obtain permits from a builders exchange, and by refusing such permits to those who did not support the plan. We held that any resulting interference with the free movement of materials from other states, due to the lack of demand therefor upon the part of builders who were excluded from purchasing such materials by reason of their refusal to support the plan, was incidental, indirect and remote, and, therefore, not an unlawful interference with interstate commerce. After pointing out that the question was thus determined by applying the *Coronado* and *United Leather Workers* cases, we said:

"The alleged conspiracy and the acts here complained of, spent their intended and direct force upon a local situation,—for building is as essentially local as mining, manufacturing or growing crops,—and if, by a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act."

The pertinent facts of that case and those here alleged are substantially the same, and subject to the same rule. It follows that the federal district court was without jurisdiction because the federal question presented was plainly unsubstantial, since it had, prior to the filing of the bill, been foreclosed by the two previous decisions last named, and was no longer the subject of controversy. See also *Browning* v. *Waycross*, 233 U. S. 16, 22-23; *General Railway Signal Co.* v. *Virginia*, 246 U. S. 500, 509-510. The decree must be affirmed for this reason and it becomes unnecessary to consider the other ground discussed by the court below and upon which its decision primarily was predicated.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.